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NO.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

IN THE MATTER OF:

GARY GREEN,

PETITIONER

vs.

MAURICE FOLEY,

RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Court of Appeals for the Fourth Circuit has so for departed from propriety and the minimally required course of judicial proceedings that this Court should exercise its power of supervision over that Court.

2. Whether the Court of Appeals improperly failed to follow the precedents of this Court in affirming the district court's imposition of Rule 11 sanctions against Petitioner but not his counsel.

3. Whether this court should exercise its power of supervision where the denial of due process to Petitioner by a panel of the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings that it appears to have been calculated to cover up earlier improprieties by the same panel and to continue an irrational personal vendetta against Petitioner.

4. Whether the decision of the Court of Appeals affirming the denial of Petitioner's Fed. R. Civ. P. 60(b) Motion conflicts with the decision of this Court.

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RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The petitioner, Gary Green, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered on June 6, 1990.

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix A, *infra*, 1a-36a) is unreported. The opinion of the district court (Appendix B, *infra* at 145a-14aa) is unreported.

JURISDICTION

Invoking federal jurisdiction under 28 U.S.C. §1331, the Petitioner brought this suit in the United States District Court for the District of Maryland. On March 5, 1987, venue was changed, pursuant to 28 U.S.C. §1404, and the case transferred, in accordance with 28 U.S.C. §1391(a), to the United States District Court for the Eastern District of Virginia.

The judgment of the Court of Appeals was entered on June 6, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES AND RULES INVOLVED

The Fifth Amendment to the Constitution of the United States provides, in pertinent part:

> No person shall...be deprived of life, liberty, or property, without due process of law...

Federal Rule Civil Procedure 11 is set forth in Appendix J at Rule 60(b) 200a - 202a.

Federal Rule Civil Procedure 60(b) is set forth in Appendix K at 203a-204a.

STATEMENT OF THE CASE

Petitioner, Plaintiff below, is Gary Green, who is a citizen of the Commonwealth of Pennsylvania, an attorney who is licensed to practice in Pennsylvania and who is a member of the Bar of this Court. Despite his profession, Green was an ordinary party litigant in this case and at all times prior to proceedings in this Court after the ruling by the Fourth Circuit, Green was represented by counsel who were licensed to practice in Virginia. Respondent is Maurice P. Foley, is a citizen of the Commonwealth of Virginia.

Foley, together with Alan H. Silverstein and Stephen Zimpel, were partners in Fairfax Associates, Ltd.[1] ("Fairfax Associates"). Fairfax Associates which was formed for the single purpose of acquiring an apartment complex for the purpose of

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[1]Zimpel and Foley were general partners, each with a forty percent interest. Silverstein was a limited partner with a twenty percent interest. Zimpel was Managing General Partner.

renovating and converting it to condominiums for resale, borrowed funds from Mount Vernon Savings and Loan Association ("Mount Vernon") (succeeded by Crossland Savings Bank) and pursuant to Virginia law, gave a deed of trust note to Mount Vernon. Zimpel, Foley and their wives executed a Guaranty Agreement in which they assumed liability as guarantors of the Mount Vernon note. Silverstein did not sign any guaranty. None of the partners contributed any funds and the condominium project was to be financed entirely with money borrowed from banks.

On January 28, 1983, additional funds were borrowed by the partnership for the condominium project, and Foley and his wife executed a guaranty agreement with Virginia National Bank (succeeded by Sovran Bank, N.A. ("Sovran")), in which they assumed liability as guarantors on any loan made to Fairfax Associates up to a maximum of $221,500. On September 4, 1984, Fairfax Associates borrowed

still additional funds from Sovran. The loan was evidenced by a commercial note, and made subject to the Foleys' previous guaranty.

All of the partners, including Foley, took substantial distributions of portions of the borrowed funds and treated them as anticipated profits. However, the condominium project was a financial failure and by November of 1984, Fairfax Associates was insolvent, had no operations, no funds or unencumbered assets, and no conceivable ability to pay off its outstanding debts. Zimpel and Silverstein each returned to the partnership whatever funds had been received by them as anticipated profits and contributed substantial additional funds to pay some of the partnership debts; however, Foley refused to do the same, claiming a lack of funds. As anticipated profits, Fairfax Associates still owed approximately $275,000 to the banks and this outstanding debt was having a negative impact on Silverstein's and Zimpel's

credit transactions in matters unrelated to their partnership with Foley. But, because they had suffered a large financial loss while Foley still retained the anticipated profits he had taken out of the partnership, Silverstein and Zimpel objected to personally paying off the remaining balance owed by the partnership and therefore releasing Foley from any further obligation to the banks. They also did not wish to litigate against Foley due his claimed insolvency and their disinclination to become involved in any business litigation.

Gary Green represented Silverstein and Zimpel in legal matters unrelated to Fairfax Associates.[2] At the suggestion of Silverstein and Zimpel, and after much cajoling, Green reluctantly agreed to accept an assignment of the two notes guaranteed by

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[2]Green is a trial lawyer in Philadelphia, Pennsylvania, with an emphasis on federal civil rights matters. He is not experienced in the area of banking or commercial paper nor matters involving Virginia law. Affidavit of Gary Green, dated November 28, 1988, Paras. 2,3,7,16, Appendix 150a, 151a, 154a, 162a. He retained Virginia counsel in connection with this action and relied upon the advice of counsel throughout. Green Aff. Paras. 32-37, Appendix, 163a.

Foley as full and complete payment of $10,000 in outstanding fees[3] owed by Silverstein and Zimpel to Green for services rendered in connection with their acquisition of an interest in a Malvern, Pennsylvania corporation. As a condition to his acceptance of Foley's notes, Green insisted that they had to be structured to the satisfaction of Silverstein and Zimpel's local Virginia attorneys and the two banks which would be making that assignment of the notes.

On December 31, 1984, Zimpel and Silverstein purchased a cashier's check in Green's name. The cashier's check was obtained with funds debited by Sovran directly from the personal accounts of Zimpel and Silverstein.[4] The cashier's check was

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[3]The face value of the notes exceeded the amount due Green in fees; however, the notes were in default and Green believed, correctly, that Foley was insolvent. Green Aff., Para. 17, Appendix 163a.

[4]On the same day, funds from Zimpel's and Silverstein's personal accounts were placed erroneously into the bank account of Fairfax Associates. The funds were withdrawn from the partnership account and returned to their personal accounts on January 2, 1985 when the mistake was detected. It is significant that, as a limited partner who had signed no

then used to purchase the Sovran note in Green's name. Green had been advised that Silverstein had cleared the transaction with his Virginia lawyer and that the banks, and he therefore assumed that the transaction was lawful and the assignment of the notes was effective. The notes were sent by the bank directly to Green.[5]

Green put the notes in his law firm's safe and forgot about them. However, the notes were observed by one of Green's law partners who cautioned Green that if Green did not record the notes as judgments, they would be worthless. Accordingly, a year and one-half after receiving the notes from the banks, Green employed a Virginia attorney, Lawrence Freedman, to represent him in

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guaranty, Silverstein had no personal liability on any of the notes and therefore, the deposit of his personal funds in the partnership account would not have satisfied any personal legal obligation.

[5] "I assumed that Sovran Bank would not have issued the note and guarantees to me if they were invalid and had no suspicion that a claim would be made that the Fairfax Associates' debt had been extinguished." Green Aff. para. 30, Appendix 186a.

an action to file the notes and obtain judgment on them.

Suit was filed against Foley in the United States District Court for the District of Maryland on August 22, 1986.[6] Jurisdiction was based upon diversity of citizenship. The Complaint, drafted solely by Freedman, described Green as a bona fide purchaser for value.[7]

On or about October 23, 1986, Foley, invoking the provisions of Va. Code Section 49-25, made demand upon Green to institute suit for collection of the two notes against the partnership as the principal debtor.[8] In response to this demand,

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[6]Foley's wife Judith, was initially named as a Defendant as well. The action as to her was dismissed without prejudice on December 3, 1986.

[7]Green reviewed the Complaint which was drafted solely by his Virginia attorney. He assumed that the phase "bona fide purchaser" was used in Virginia as the equivalent of "holder", Green was not conversant in Virginia law and relied entirely on his lawyer.

[8]Green had no prior knowledge that such an action might be required under Virginia law and again, relied on his Virginia lawyer to devise, suggest and implement the appropriate litigation strategy.

Green filed suit against the partnership (Fairfax Associates) and the other guarantor (Zimpel) on November 24, 1986 in the Circuit Court of Fairfax County, Virginia.

On Foley's motion for a change of venue, the federal action pending in Maryland was transferred to the United States District Court for the Eastern District of Virginia on March 5, 1987. Foley filed his first and only discovery requests, together with a request for admissions, on June 4, 1987. Green's attorney responded to Foley's discovery requests on *July* 2, 1987 which was *4* days before a response was due.[9]

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[9]After his attorney, Freedman, forwarded the discovery requests to him, Green personally responded promptly to the request; he reviewed a copy of the discovery request on June 7 and mailed draft responses and copies of all requested documents to Freedman on June 19, 1987. Foley scheduled the deposition of Green but unilaterally cancelled it. Hence, no depositions were taken by any party. The record evidence therefore was quite bare and consisted primarily of the notes and a December 14, 1984 letter agreement Green produced which set forth his arrangement with Silverstein and Zimpel concerning their assignment of the notes and Foley's guarantee.

Green and Foley filed motions for summary judgment.[10]

The cross motions were argued on July 2, 1987. The court, on the same day dismissed the claim as to the Mount Vernon note, without prejudice, based on Virginia Notice Statute, Va. Code Section 49-25 (1986) which the court filed a suit against a maker of a note before a guarantor could be sued. The court found however, that Foley specifically waived that statutory right in the Sovran note agreement he signed with regard to

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[10] In his brief in support of his Motion for Summary Judgment, Foley acknowledged that he was aware that Silverstein and Zimpel had "arranged" the transaction by which the notes were sold to Green. Foley's motion rested entirely on the argument that Green failed to diligently prosecute a lawsuit against the partnership in his role as the principal debtor. Of course, Green knew from Silverstein and Zimpel that their partnership was insolvent and by 1987 (the time of suit) it had no chance of ever becoming solvent. Therefore, from a practical standard procedure, there was no benefits to suing it. Foley's response to Green's motion for summary judgment charged that the litigation had been "conceived in collusion." Despite Foley's awareness of the manner in which Green acquired the notes and the possibility it would support an affirmative defense, his opposition to Green's motion for summary judgment neither raised any other affirmative defense nor included a Rule 56(f) affidavit stating that he had yet to obtain sufficient discovery to support his case.

the Sovran note and granted Green summary judgment on the Sovran note.

On July 29, 1987, Foley filed a Motion to Vacate Summary Judgment and Grant Rehearing and Reconsideration pursuant to Rule 59(e) of the Federal Rules of Civil Procedure. In his motion, Foley made three arguments. First, Foley claimed surprise as to the December 14 letter agreement, and argued that the letter created a material issue of fact as to the extinguishment of the debt. Second, Foley argued that Green's response to Foley's motion should have been considered by the district court to be unopposed. Third, Foley argued that he did not anticipate that Green's counsel would assert that Foley had waived his rights under the Virginia Notice Statute.

Two days later, on July 31, 1987, before Green had an opportunity to respond to Foley's motion to vacate, the District Court denied Foley's motion, holding that: 1) Foley had failed to establish that he

had been unfairly prejudiced; 2) Green's December 14 letter to Silverstein and Zimpel had no legal impact on or significance to Green's right, as holder, to enforce Foley's guarantee of the note; and 3) Foley had cited no authority whatsoever to support his position that the Virginia Notice Statute had not been waived by the express terms of his guaranty agreement for the Sovran note.[11]

Foley filed his Notice of Appeal to the Fourth Circuit on August 18, 1987.

On October 6, 1987, Foley took the deposition of Zimpel as part of a lawsuit in Virginia State Court where Green sued Foley and Zimpel on the Mount Vernon Note, which had Green removed as an issue from the federal court case by the district

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[11] The speed with which the district court acted upon Foley's first post-judgment motion precluded Green from responding factually to Foley's erroneous speculation and hyperbolic description about the "facts" giving rise to the December 14 letter and how Green became the holder of the note and guarantee.

court's July 2nd order. Foley's counsel later claimed that during the course of this deposition, he

> determined, for the first time, that the promissory note and guarantee agreement . . . were not purchased form the payee bank by Green as Green alleged in his pleadings and motions in the District Court, but rather paid off with funds out of the account of Fairfax Associates, Ltd., the principal debtor on the note, by Foley's two partners, Mr. Zimpel and one Alan Silverstein.[12]

Foley used the Zimpel deposition as a basis for requesting that the Fourth Circuit extend the time for him to file his brief or, in the alternative, to stay or remand.

On October 21, 1987, Foley filed with the district court a Motion For Relief From Judgment under Rule 60(b)(3). In this motion, Foley argued that he had just learned in depositions of "misrepresentations" in Green's pleadings and motions; and claimed that these

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[12] Later, however, counsel stated that the Zimpel testimony merely "confirm[ed] that events took place *exactly* as contemplated in [the December 14 letter]."

"misrepresentations" had prevented him from asserting a meritorious defense to the suit against him.

On October 22, 1987, the Fourth Circuit stayed its briefing schedule pending the district court's consideration of Foley's "new" evidence.

On October 30, 1987, the district court conducted a hearing on Foley's Rule 60(b)(3) motion. Foley presented *excerpts* from the Zimpel deposition, bank records, and a chart purportedly describing the transactions which led to the purchase of the cashier's check in Green's name. After considering the briefs and additional materials submitted by Foley, the district court denied this second post-judgment motion, ruling that the evidence offered by Foley was neither material nor newly discovered under Rule 69(b)(3).

Foley appealed the denial of this second post-judgment motion on November 6, 1987 and Foley's two appeals were consolidated.

Silverstein's deposition was taken in the state court proceeding on May 9, 1988. Among other things, Silverstein testified that the cashier's check was purchased with his and Zimpel's personal funds to pay legal fees they owed Green for matters unrelated to the partnership and that neither he nor Zimpel ever intended to extinguish the partnerships debt to the banks nor to release Zimpel or Foley's guarantors.

On June 6, 1988, Foley took a state court deposition of David L. Gunn, Sovran's commercial loan officer. Gunn testified that the funds used to purchase the cashier check in Green's name had been debited directly from the personal accounts of Silverstein and Zimpel and that the funds placed by them mistakenly into the account of the Fairfax Associates partnership played no role in the transaction.

Foley withheld the testimony of Silverstein and Gunn from the Court of Appeals when the case was

argued on July 5, 1988, and in the post-argument letters submitted by Foley's counsel to the Fourth Circuit. Moreover, Foley submitted to the Fourth Circuit a distorted portion of the Zimpel deposition which was bound in a way that made it look like a complete transcript, but which excluded explanatory testimony from Zimpel which established that Zimpel did not mean to say what Foley attributed to him.

The Court of Appeals ruled on September 13, 1988[13] relying substantially on the supposed "factual" material submitted to it by Foley *after* the district court record had been closed. The Fourth Circuit ruled that for Rule 60(b)(3) purposes, Green had defrauded the trial court by withholding evidence and misrepresenting the nature of the transaction concerning the assignment of the notes to him by the banks. The Fourth Circuit found as a fact that the money to purchase the Sovran note had been supplied *via* the partnership account,

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13 *Green v. Foley*, 856 F.2d 660 (4th Cir. 1988).

which caused the note to be extinguished. As an alternative, the Court held the note had been paid by its "makers" (erroneously identified as Zimpel and Silverstein), with the same result. Although there was no testimony or evidence on the issue, the Court excoriated Green for his supposed dishonesty, and stated that Green had "no intention" of disclosing the "true" manner in which he obtained the notes. The Fourth Circuit reversed and instructed the district court to enter judgment for Foley upon remand.[14]

On September 27, 1988, Green, acting through new counsel, filed a Petition For Rehearing, Suggestion For Rehearing En Banc, And Motion To

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[14] The Opinion written by Circuit Judge Murnaghan, was remarkable in both the *ad hominem* nature of the attack on Green and the fact that there was no evidence developed in the district court to even suggest the factual scenario and inferences the Fourth Circuit recited in Judge Murnaghan's Opinion. Indicative of the vindictiveness evinced by Judge Murnaghan is the fact that soon after Green requested a rehearing by the Fourth Circuit *en banc*, Judge Murnaghan sent a formal letter of complaint to the Disciplinary Board of the Pennsylvania State Bar, calling its attention to what he regarded as Green's professional misconduct. Appendix E., 80a-82. The Disciplinary Board, after an investigation, dismissed Judge Murnaghan's complaint.

Supplement The Appellate Record with the Fourth Circuit. The Petition asked the Fourth Circuit to permit Green to offer evidence about the transaction which would disclose that Judge Murnaghan's Opinion was factually incorrect and not based on any evidence. The Petition explained further that due to the fact that Green had been the winner in a summary judgment proceeding, and because proper appellate practice presumably precluded the submission of evidence to the Court of Appeals, Green had no earlier opportunity to present evidence. The Petition was denied on October 14, 1988, and as was Green's request for a stay of the mandate. Chief Justice Rehnquist likewise denied Green's application for a stay on October 25, 1988.

The case was remanded and the district court entered summary judgment for Foley on October 28, 1988. Green filed his Petition For Writ of Certiorari with this Court on January 11, 1989, which was subsequently denied.

Foley gave notice that he intended to file a Rule 11 Motion against Green and his prior counsel, Freedman, based on the findings of fact made by Judge Murnaghan in the Fourth Circuit's Opinion.

On November 9, 1988, Green noticed the depositions of Foley and his counsel to defend the Rule 11 Motion and to establish on the record for the first time the true facts about Green's conduct and the note transaction. Green intended to use these facts to support a Rule 60(b)(3) Motion. Nonetheless, Foley's motion for a blanket protective order was granted by a magistrate on November 18, 1988, and Green was denied all discovery.

On November 14, 1988, Foley renewed a Motion for Rule 11 Sanctions originally filed on September 23, 1988. Foley requested the district court to award in excess of $78,000 for fees and costs Foley allegedly incurred in (a) defending Green's Complaint in the district court; (b) filing and prosecuting Foley's appeal to the Fourth Circuit;

and (c) prosecuting and defending claims in the Virginia State Court.[15]

Green responded with a motion appealing the Magistrate's protective order; a motion for relief from judgment pursuant to Rule 60(b); a motion for sanctions against Foley for providing the Fourth Circuit with the misleading portions of the Zimpel deposition from the state court case while intentionally withholding the corrective and explanatory depositions of Silverstein and Gunn; and a Motion for an evidentiary hearing on the Rule 11 and the 60(b) issues.[16]

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[15] As will be discussed, the United States Supreme Court has ruled directly in *Cooter & Gell v. Hartmarx*, 496 U.S. _____, 110 L.Ed. 359 (1990) that Rule 11 would not cover the Fourth Circuit proceedings, and by implication, the Virginia State Court case likewise would not support a Rule 11 award.

[16] The Virginia state court proceeding (from which Zimpel's partial deposition transcript was filed) was tried to a jury verdict in July of 1989. In that case, the jury heard Foley's evidence as well as Green's evidence. Foley attempted to use the Fourth Circuit's opinion as a blueprint for trying the state court case and Green was thus obliged to disprove the Fourth Circuit's conclusions. The trial consumed a week of testimony, and the jury promptly returned a verdict in favor of Green. The Virginia Supreme Court dismissed Foley's appeal. This result is consistent with the finding of the Pennsylvania Disciplinary Board's dismissal of Judge Murnaghan's complaint. Hence, Green has prevailed in every

On December 2, 1988, Judge Bryant in the district court denied Green's motions on the grounds that the Fourth Circuit's findings of fact were dispositive, and that even if the district court disagreed, it was powerless to entertain Green's Rule 60(b) motion or otherwise fail to accept the Fourth Circuit's findings and conclusions of wrongful conduct by Green. The Court imposed a $20,000 sanction against Green. Judge Bryant however imposed no sanction against Green's former counsel, Lawrence Freedman. Green appealed the district court's December 2, 1988 rulings to the Fourth Circuit.

Green's counsel learned that Judge Murnaghan and the same panel members of the Fourth Circuit who participated in the original opinion, were

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proceeding and forum where Green was permitted to present evidence to balance the unsupportable accusations made by Foley and Judge Murnaghan. By contrast, by denying him *any* opportunity to present evidence was the Fourth Circuit able to make its findings of fact.

assigned to Green's appeal. On February 1, 1989, Green filed a motion for the disqualification of this panel, and cited the fact that the entire panel had subscribed to Judge Murnaghan's letter to the Pennsylvania Disciplinary Board, thus showing bias. The Motion was denied on February 17, 1989.

On June 6, 1990, the Fourth Circuit, in an *unpublished*, twenty-one page, *per curiam* opinion, affirmed the decision of the district court, holding that the district court's refusal to allow Green to introduce further evidence concerning the transfer of the notes did not deny him due process of law; that an evidentiary hearing was not required for imposing Rule 11 sanctions; and that the imposition of Rule 11 sanctions against Green and not his attorney was not an abuse of discretion.

Green sought stay of the mandate with the Circuit Court, the Supreme Court and the district court, noting that he had filed with the district court a supersedeas bond in the amount of $25,000. All

of Green's motions for a stay were denied. Foley then executed on Green's bond, and he has been paid in full for the Rule 11 sanction and his costs.

Although Green was sanctioned in the amount of $20,000, he is not pursuing this appeal solely because of the monetary amount involved. Rather, he seeks to vindicate his reputation, which was tarnished by what can be described best as a deliberate campaign by a judge on the Court of Appeals for the Fourth Circuit to eschew normal procedure and due process for the apparent purpose of vilifying Green.

REASONS FOR GRANTING THE WRIT

A. The Decision And Actions Of The Fourth Circuit Have So Far Departed From Propriety And Required Due Process That This Court Should Exercise Its Power Of Supervision Over The Circuit Court

The Fourth Circuit, in the first decision of this case, clearly departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power. The Petitioner does not desire to rehash the first decision of the Fourth Circuit. However, because the Court's second opinion is an extension of its original course of conduct, an examination of that first decision is necessary to enlighten this Court as to the unusual steps that the Fourth Circuit has taken in its two decisions to vilify Green.

The Fourth Circuit, in its first opinion, took the unusual step of ordering the entry of summary judgment against Green and reversing the summary

judgment the district court had entered for Green. This *entry* of summary judgment by the Fourth Circuit on the basis of a *story* Foley related to the Fourth Circuit which had never been heard on the merits below. Green never had the opportunity in this case to present any evidence, contrary to unambiguous decisions of this court. *See e.g. Singleton v. Wulff*, 428 U.S. 106 (1976); *Florida Avocado Growers v. Paul*, 373 U.S. 132 (1963); *Byrd v. Blue Ridge Rural Electric Cooperation*, 356 U.S. 525 (1958); *Fountain v. Filsen*, 336 U.S. 681 (1949).

The Fourth Circuit's first decision in this case accepted new and pseudo evidence from a state court deposition which Green never was given the opportunity to refute. The record before the Fourth Circuit was scant, consisting of the district court pleadings; answers to interrogatories; admissions; and a few documents. (Foley's unverified allegations about the facts and the after judgment

partial transcript of the Zimpel deposition in the state court case were not properly before the Fourth Circuit). Green was the judgment winner, and in light of the district court's abbreviated proceedings, there was no evidence in the record offered by Green other than the notes and guarantees. Indeed, Green had no reason or opportunity to offer other evidence in the district court, and he had no reason to anticipate that the Court of Appeals would take the unusual step of making its own findings of fact on an incomplete record that was not considered by the district court. Nevertheless, the Fourth Circuit's September 13, 1988 opinion accepted and expanded upon Foley's unilateral presentation.

Green has been the object of the most unusual departure from the rules and regulations of the Fourth Circuit as well as peculiar behavior by Judge Murnaghan. Apparently not satisfied with disparaging Green's name in the Opinion, Judge

Murnaghan (speaking for the whole panel) sent a letter to the Disciplinary Board of the Supreme Court of Pennsylvania to complain about and report Green for professional misconduct. (Appendix E, 80a).[17]

The Fourth Circuit's second decision (which is the subject of this Petition) once again disregarded the facts and law, and affirmed the Rule 11 sanctions against Green. In doing so, the Fourth Circuit paid no heed to either the precedents of this Court or the law. In its second decision, the Fourth Circuit affirmed the district court's imposition of sanctions, ruling that although Green was denied any evidentiary hearing, he was not denied due process. However, in the second opinion, *new* elements emerged in the Fourth Circuit's actions which confirmed that Green was still getting "special treatment". (Appendix A)

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[17] After an inquiry and investigation into this matter, the Pennsylvania Disciplinary Board *exonerated* Green.

The Fourth Circuit issued a twenty-one (21) page, unpublished, *per curiam* opinion, although its decision related to the important and timely issue of Rule 11 sanctions and covered novel elements about which the lower courts in the Circuit would need guidance. It is submitted that the Opinion was issued unsigned and unpublished because the Fourth Circuit announced rules of law which applied to Green, but which it did not want applied generally. Indeed, there is no right to due process nor do the rules of procedure have any force in the Fourth Circuit's version of the "law for Green".

B. The Fourth Circuit Improperly Failed To Follow The Precedents Of This Court In Affirming The District Court's Imposition Of Rule 11 Sanctions Against Green And Not His Counsel

The Fourth Circuit violated this Court's precedents requiring that Rule 11 sanctions must be accompanied by specific findings of fact. Recently, this Court reaffirmed the proposition in *Cooter &*

Gell v. Hartmarx, 496 U.S.____, 110 L.Ed. 359 (1990). In *Cooter & Gell* (which was decided by this Court *after* the Fourth Circuit's decision), this Court held that a district court "must consider factual questions regarding the nature of the attorney's prefiling inquiry and the factual basis of the pleading or other paper." *Id.* 377.

The Fourth Circuit also violated its own holdings because prior to its unpublished opinion in this case, the Fourth Circuit had ruled that district courts must make specific findings of fact to support the award of attorney's fees. In *Barber v. Kimbrell's*, 577 F.2d 216 (4th Cir. 1977), the Fourth Circuit remanded the district court's award of attorney's fees in a case involving the Truth in Lending Act, "for detailed findings in support of [the] award." 577 F.2d at 26. The Fourth Circuit concluded:

> We cannot afford effective appellate review unless we have before us the district

> court's reasons for finding a particular award appropriate.

577. F.2d at 226.

See, also Introcaso v. Cunningham, 857 F.2d 965 (7th Cir. 1988).

The Fourth Circuit should have reversed the district court here since the district court never identified which offending papers were the subject of its Rule 11 sanctions, and actually refused to make factual findings or even allow a factual record to be made. *See*, e.g. *Brown v. Federation of State Medical Boards*, 830 F.2d 1429 (7th Cir. 1987); *Donaldson v. Clark*, 819 F.2d 1551 (11th Cir. 1927).

The Fourth Circuit's action was therefore based on a district court record that did not have the rudimentary elements required by this Court. Indeed, the rationale offered from the district court was conclusory and eschewed facts. Thus, the district court held from the bench:

> "An award of $20,000.00...is in my view a sufficient sanction to vindicate the objective sought by Rule 11.

> More would unduly punish the Plaintiff when considered in the context of what he has already undergone. Less would in my view minimize the severeness of the conduct that this Court of Appeals has found and which I don't think I am able to reexamine."

The district court explained that:

> The court "[doesn't] get into the question of whether [Defendant's] although fees are reasonable"...,"because the figure I am going to award is not going to fully compensate the Defendant for his attorneys fees."

The excerpts of the district court transcript are attached hereto as Appendix "F". The district court in this case accepted as binding all facts and all inferences which the district court interpreted from the Fourth Circuit's first opinion, even though the district court knew the Fourth Circuit had no factual record when it issued its opinion. The district court knew also that Green never had the opportunity in the district court (or in the Circuit Court) to present any facts in support of his position. Yet, the district court ruled that the factual questions regarding the

basis of the pleading which allegedly violated Rule 11 were not before it because it was bound by the Fourth Circuit's first opinion. While such deference was probably flattering to the Fourth Circuit, it had to recognize that the district court had abused its discretion and had committed fundamental error. Nevertheless, the Fourth Circuit affirmed.

The Fourth Circuit, unabashedly acknowledged in its unpublished opinion that the district court's Rule 11 sanctions were not based on any rational basis:

> [T]he district court awarded Foley $20,000 without an in depth investigation of the reasonableness of the attorneys' fee claimed by Foley. (Appendix, 34a)[18]

The district court never identified the specific pleadings in which the alleged misrepresentation was contained, and it did not state what particular

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[18] In *Matter of Yagman*, 796 F.2d 1165, 1184 (9th Cir. 1986), the Ninth Circuit held that "...a sanction award be *quantifiable* with some precision and properly itemized in terms of perceived misconduct... " The blanket award of $20,000 by the District Court in this case clearly was not based on a *quantifiable* amount. The $20,000 sanction was unsupported by any findings.

conduct of Green violated Rule 11. The Fourth Circuit however took it upon itself and interjected "[t]hat misrepresentation [Green's status as a bona fide purchaser for value] appeared in the complaint and other subsequent pleadings." (Appendix A, 11a). Since the district court never made any such finding we once again see the Fourth Circuit embracing the role of original fact finder when it comes to a case involving Green. Clearly, in the face of silence by the district court, the Fourth Circuit had no license to attempt to read the district court's mind; at the very least, rather than interpret and fill in the blanks on the crucial issue of what the district court found in Green's conduct violative of Rule 11, the Fourth Circuit should have remanded.

Further, the inadequacy of the record is illustrated by the Fourth Circuit's approval of the district court's decision to impose sanctions against Green, but not his attorney, Freedman. The district

court set forth no reasons to distinguish between Freedman and Green.[19]

Clearly, Judge Bryant favored a local attorney, Freedman, at the expense of Freedman's Philadelphia based client, since there was nothing in the record or the body of Rule 11 to explain why what Freedman did was proper but that Freedman's client violated the Rule. Based on this illogical and inconsistent decision of the district court, the Fourth Circuit should have either reversed or remanded the case for findings.[20]

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[19] The Fourth Circuit imposed a higher standard upon Green based upon the incorrect conclusion that he is sophisticated in business transactions. This was incorrect, as Green specializes in litigation primarily civil rights law. However, even assuming *arguendo* that Green urged his attorney, Freedman, to advocate a legally frivolous position, the lawyer should bear the sanctions. *See Untereriner, A Uniform approach to Rule 11 sanctions*, 101 Yale L Rev. 901, 914 (1988). There was no evidence that Green had any power to compel Freedman to violate Rule 11 or that Freedman contended that Green lied to him.

[20] The imposition of sanctions against a client only are *rare*. Vario, Rule 11: *A Critical Analysis*, 118 F.R.D., 189, 207 (1988). *But, See*, e.g. *Chevron, U.S.A., Inc. v. Hand*, 793 F.2d 1184 (1985).

Most cases imposing sanctions against the client alone apply either against the United States, or parties appearing *pro se*.[21] There is nothing in the record here which would allow the Fourth Circuit to conclude that Green was the kind of catalyst to litigation as to be deprived of his right to rely upon legal counsel. The Fourth Circuit's refusal to follow the precedent of this Court requiring that specific factual findings must be made *prior* to the imposition of Rule 11 sanctions further displays the Court's bias against Green.

Most of Foley's request for monetary sanctions was tied directly to his attorneys fees in the state court action and in the Fourth Circuit. The $20,000 award, by necessity, included at least some of

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[21] See, *e.g.*, *Peth v. Breitzman*, 611 F. Supp. 50 (D. Wis. 1985); *Eske v. Hynes*, 601 F. Supp. 142 (E.D. Wis. 1985); *Miller v. United States*, 604 F. Supp. 804 (E.D. Mo. 1985); *Felix v. Arizona Dept. of Health Services*, 606 Supp. 634 (D. Ariz. 1985); *McLaughlin v. Bradlee*, 602 F. Supp. 1412 (D.D.C. 1985); *Johnson v. United States*, 607 F. Supp. 347 (E.D. Pa. 1985); *Steele v. Morris*, 1 F.R.S.3d (S.D.W. Va. 1985); *Thayer v. Columbia University*, 35 F.E.P 1264 (1984); *Meyers v. United States*, 589 F. Supp. 1528 (M.D. La. 1984).

Foley's state court and appellate attorney fees. However, in *Cooter & Gell*, this Court held that Rule 11 *does not* authorize a district court to award attorney's fees incurred on appeal. "...[R]ule 11 is more sensibly understood as permitting an award only by the filing, logically, at the trial level. *Id.* at 382. By analogy, sanctions cannot be awarded for attorneys fees expended in a state court case or on appeal to a U.S. Court of Appeals. The Fourth Circuit's refusal to reverse the district court, based upon the district court's failure to limit Foley's Rule 11 sanctions to attorneys fees incurred at the district court level, is therefore directly contrary to this Court's holding in *Cooter & Gell*.

In light of this Court's holding in *Cooter & Gell*, decided *after* the Fourth Circuit's decision in this case, review by this Court is necessary. Indeed, on June 28, 1990, this Court in *Gedan v. Partington*, 496 U.S. ____, 110 L.Ed.2d 359 (1990), summarily granted a Petition for Certiorari, vacated the

judgment of the Ninth Circuit, which had imposed Rule 11 sanctions, and remanded the case to the Circuit Court. The basis of the remand in *Gedan* was the Court's decision in *Cooter & Gell*. This Court's rulings in *Cooter & Gell* and *Gedan* are clear indications that the trend in this Court has been to critically review the imposition of Rule 11 sanctions. Petitioner submits that the Fourth Circuit's ruling in this case is directly contrary to *Cooter & Gell* and review of this case is warranted.

C. The Denial Of Due Process To Green By A Panel Of The Court Of Appeals Has So Far Departed From The Accepted And Usual Course Of Judicial Proceedings That It Appears To Have Been Calculated To Cover Up Earlier Improprieties By The Same Panel And Continue An Irrational Personal Vendetta Against Petitioner

In *Roadway Express, Inc. v. Piper*, 447 U.S. 572 (1980), this Court made clear that the award of attorney's fees was subject to the requirements of due process and that fees should not be

determined without "fair notice and an opportunity for a hearing on the record." 447 U.S. at 767. *See also Schwarzer, Sanction Under the New Federal Rule 11-A Closer Look*, 104 FRD 181 (1985). The application of due process to Rule 11 proceedings is recognized in the Advisory Committee Comments to the Rule. Several circuits have recognized the applicability of due process to Rule 11 proceedings. *See Gagliardi v. McWilliiams*, 834 F.2d 81 (3d. Cir. 1987); *Donaldson v. Clark*, 819 F.2d 1551 (11th Cir. 198); *E.T.C. v. Alaska Land Leasing, Inc.*, 299 F.2d 507 (9th Cir. 1986). In fact, one circuit has held that Rule 11 hearings *must* be evidentiary in nature when there are disputed issues of material fact to the motion. *In re Richardson*, 793 F.2d 37 (5th Cir. 1986).

The reasoning that evidentiary hearings are not generally held in connection with Rule 11 sanctions is based on the belief that the factual record would have been fully developed before the trial court and

that the trial court would have witnessed counsel's conduct. In fact, the Advisory Committee comments on Rule 11 state that in the case of pleadings, the sanctions issued under Rule 11 normally will be determined "*at the end of the litigation*." Thus, the framers of the Rule envisioned that *prior* to Rule 11 sanctions being imposed, a full factual record would be before the trial court. However, this was not the case here because the sequence of the case prevented the development of a full factual record. The need for an evidentiary hearing was totally appropriate and warranted here as evidenced by the severity of the sanctions imposed against Green. Due process as required by the Fifth Amendment to the Constitution has not been afforded Green by the District Court or Circuit Court. Accordingly review by this Court of the Fourth Circuit's decision is necessary.

D. The Fourth Circuit's Ruling Which Affirmed The Denial Of Green's Rule 60(b) Motion Conflicts With The Decisions Of This Court

In *Klapprott v. United States*, 335 U.S. 601 (1949), this court stated that the purpose of Fed. R.C.P. 60(b) is "to vacate judgments whenever such action is appropriate to accomplish justice". *See also Liljeberg v. Health Services Corp.*, 486 U.S. 847, 863-864 (1988). Rule 60(b) should be liberally construed by a district court and under the Rule, a district court has the power to grant relief from a judgment when, under all the circumstances, such action is necessary in the furtherance of justice. *Moore*, Federal Practice, Par. 60.27[1]. The Circuit Court's refusal to reverse the district court's denial of Green's motion for relief from judgment pursuant to Rule 60(b)(6) was in direct contravention of the precedents of this Court as noted above.

The offered evidence demonstrated that the prior findings of the Fourth Circuit - which were

based upon the unilateral version of the facts presented by Foley *after* summary judgment had been granted for Green - was substantially different from the facts later developed in the state court proceeding and that their continued application worked a substantial injustice upon Green. The offered evidence made it quite clear that Fairfax Associates - the maker of the note - had no funds with which to pay the balance on the Sovran note. The evidence made clear that Silverstein was not a guarantor and the money to purchase the note on Green's behalf came from the personal accounts of Silverstein and Zimpel and is not from the partnership. More important, the facts Green would have offered would have demonstrated that the Guaranty was obtained by Green properly, for valid consideration, and that the Guaranty was enforceable by Green.

The district court held that it was powerless to hear Green's 60(b) Motion because the Court of

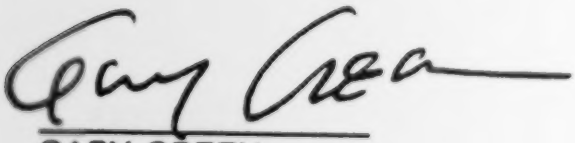
Appeals made its own findings of fact and the district court could not reverse its superior. However, Green did not have the opportunity to submit any evidence to either court, and Rule 60(b) clearly contemplates receipt by the district court of material evidence which was not known at the time that an earlier judicial decision was rendered.

The Fourth Circuit deprived Green of the opportunity to present his side of the story. Here, Green's Rule 60(b) Motion was essential to a determination of whether Rule 11 sanctions were appropriate. When the Court of Appeals refused to reverse the district court's ruling on the Rule 60(b) Motion, the imposition of sanctions against Green became a foregone conclusion. But this denied Green due process of law.

CONCLUSION

For all of the foregoing reasons, Petitioner respectfully prays that this petition for *certiorari* be granted.

Respectfully submitted,



GARY GREEN

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DATED: August 31, 1990

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNPUBLISHED

No. 88-2566

GARY GREEN,

Plaintiff-Appellant,

versus

MAURICE P. FOLEY,

Defendant-Appellee.

No. 88-2667

GARY GREEN,

Plaintiff-Appellee,

versus

MAURICE P. FOLEY,

Defendant-Appellant.

Appeals from the United States District Court for the Eastern District of Virginia, at Alexandria. Albert V. Bryan, Jr., Chief District Judge. (CA-87-350-1)

Argued: February 9, 1990
Decided: June 6, 1990

Before HALL, MURNAGHAN, and SPROUSE, Circuit Judges.

PER CURIAM:

Here we are confronted by an appeal stemming from the imposition of Rule 11 sanctions against the appellant Gary Green by the district court after a remand from this Court. Green is a Pennsylvania attorney who filed suit in August 1986 against the appellee, Maurice Foley, to collect payment on two notes for about $300,000 which Foley had signed as guarantor. Foley was in a partnership, Fairfax Associates, Ltd. ("the partnership") with Alan Silverstein and Stephen Zimpel. The partnership had no assets and substantial outstanding debt, including the notes upon which Green sued. Green claimed that he was a "bona fide purchaser" from the lender, Sovran Bank. The district court granted summary judgment for Green on the notes. Foley filed for relief from summary judgment

under Fed. R. Civ. P. 60(b)(3) on the basis of new evidence showing that the notes were purchased by the partnership and not by Green, but that motion was denied.[1]

We reversed. See Green v. Foley, 856 F.2d 660 (4th Cir. 1988), cert. denied, 109 S. Ct. 1769 (1989). Just after the summary judgment hearing, Foley's attorney had discovered a letter from Green to Silverstein and Zimpel outlining the "purchase" of the notes. That and other evidence admitted to supplement the original record on appeal showed that on December 31, 1984, Silverstein and Zimpel deposited funds from their own personal accounts into the partnership account sufficient to

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[1] Fed. R. Civ. P. 60(b)(3) provides that "the court may relieve a party . . . from a final judgment . . . for . . . fraud . . ., misrepresentation, or other misconduct of an adverse party."

pay off the two notes. Later that day, they returned the funds to their own accounts.[2] The same day, they purchased a cashier's check in Green's name sufficient to pay for the notes using funds from their own accounts. The cashier's check was then used to buy the notes from the bank in Green's name.

On appeal, we held that Foley, therefore, had an "ironclad" defense of payment. That conclusion proceeded from the fact that the funds used to purchase the note were partnership funds, so the transaction extinguished the debt and released the guarantors, including Foley. We also held that, even if the funds were not deemed by law to be partnership funds after being deposited into and then withdrawn from the

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[2] Apparently, they changed their minds, or were persuaded to do so, on how to structure the transaction.

partnership account, Green acted as an agent for Silverstein and Zimpel in purchasing the notes. In essence, Green, Silverstein, and Zimpel were deemed to have constructed a sham transaction to pay off the debt, while seeking to keep alive an action against Foley as a guarantor. Thus, "[i]n his pleadings Green consistently and materially misrepresented his status as a holder of the notes, claiming that he was a 'bona fide purchaser of the notes for value.'" 856 F.2d at 666. The case was remanded with orders for the district court to enter summary judgment in favor of Foley. Green's subsequent petition for rehearing, suggestion for rehearing en banc, and motion to supplement the appellate record was denied.

On remand, the district court entered summary judgment for Foley and

considered motions by each side to impose sanctions under Rule 11. Green's motions for sanctions under Rule 11 and relief from judgment under Rule 60(b), along with several other motions, were denied. Foley asked for sanctions against both Green and his attorney, Lawrence Freedman, sufficient to cover Foley's legal fees in both federal and state court (about $80,000.00). In defense against Foley's motion for sanctions, Freedman claimed that he had been fooled along with the court because Green had told him that he had purchased the note for value and that Foley had no valid defenses to collection on the note. The district court accepted Freedman's argument and imposed no sanctions on the attorney.

Green defended against sanctions by arguing that the Court of Appeals had made its finding of

misrepresentation based on only half of the story. Green maintains that Silverstein and Zimpel owed him or his firm $10,000 in legal fees for unrelated work. He says that he purchased the cashier's check by cancelling that debt and then legitimately purchased the notes with the check. The transaction was fair, according to Green, because Foley had no assets and the possibility of collecting anything on the $300,000 worth of notes was remote. To the extent that Virginia law extinguished the debt after the transactions, he, though a lawyer, was unaware of that fact and reasonably relied upon his attorney, Freedman, that his claim was valid.[3]

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[3] Even under Green's rendition of the facts, the validity of the transaction is suspect. The "loss" from discounting the value of the notes from $300,000.00 to $10,000 was incurred by two partners, Silverstein and Zimpel. Because they provided most of the funds to pay off the debt, and because they were "makers," the purchase extinguished the debt.

The district court held that it was bound by the mandate of the Court of Appeals and refused to hear Green's evidence that he acted in good faith in claiming to be a "bona fide purchaser for value." The lower court recognized that the appellate court decision did not require it to impose sanctions, but said that it felt obligated to impose sanctions "absent some extraordinary circumstances that, even accepting the proffers of the plaintiff's attorneys, I do not find to be present." The district court then ordered Green, and not his attorney, to pay $20,000. Foley

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It was a false assumption that the purchase of the notes with the personal funds of Silverstein and Zimpel would not have extinguished the notes. As partners, Zimpel and Foley were jointly liable for all debts and obligations of the partnership. Va. Code Ann. § 50-15(b). In addition, as partners, they were agents of the partnership. As a result, purchase of the notes by Zimpel, even with personal funds, was sufficient to retire the debt and release Foley.

had asked for sanctions sufficient to compensate him for his incurred attorney's fees, but, because the award was not intended fully to compensate Foley for attorney's fees, the judge did not closely examine the reasonableness of the fees.

We turn to consideration of Green's appeal of the imposition of sanctions and Foley's appeal of the sanction award as inadequate.

Green has complained that the district court failed to make specific factual findings sufficient to support an imposition of sanctions. It is his contention that Introcaso v. Cunningham, 857 F.2d 965, 969 (4th Cir. 1988) ("[t]he district court's decision to impose Rule 11 sanctions may not be disturbed except for abuse of discretion."), has impliedly used the same standard in a Rule 11 proceeding as

the standard employed to impose attorney's fees under a statutory authorization. The latter test involves twelve facts concerning the reasonableness of the fee. See Barber v. Kimbrell's Inc., 577 F.2d 216, 226 (4th Cir.), cert. denied, 439 U.S. 934 (1978).

The reading of Introcaso is, however, too broad. In Introcaso, the district judge had imposed sanctions for all post-verdict litigation. Through Judge Winter, we reversed because "the district court did not identify what pleading, motion, or other paper, the signing of which and the proceedings stemming therefrom, it regarded as frivolous." The district court holding there, therefore, included pleadings which may not have violated Rule 11. 857 F.2d at 970.

The district judge here, however, was very specific. The sanction stemmed from the finding that Green "consistently and materially misrepresented his status as a holder of the notes [by claiming] that he was a bona fide purchase of notes of value."[4] That misrepresentation appeared in the complaint and other subsequent pleadings. Moreover, the entire proceedings, from their inception, stemmed from the misrepresentation in the complaint.

Green has attempted to argue that his statement in the complaint that he was a "bona fide purchase for value"

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[4] In addition, the detail of fact finding necessary will vary with each case. Cf. Thomas v. Capital Sec. Services, Inc., 836 F.2d 866, 883 (5th Cir. 1988) (en banc) (using a sliding scale), and Szabo Food Service, Inc. v. Canteen Corp., 823 F.2d 1073, 1084 (7th Cir. 1987) (suggesting factual findings are not necessary when the reasons for the decision are obvious), cert. dismissed, 485 U.S. 901 (1988).

was reasonable. However, the district court held that the appellate court opinion of the Fourth Circuit precluded re-examination of that factual issue.[5] Green, to try to obviate an obvious difficulty, argued that the imposition of sanctions was a separate issue not decided by the Court of Appeals, a consideration which warranted further evidentiary findings. He also has

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[5] In Stamper v. Baskerville, 724 F.2d 1106, 1107, 1108 (4th Cir. 1984), we said:

> Once a case has been decided on appeal and a mandate issued, the lower court may not "vary it [the mandate] or examine it for any other purpose than execution or give any other or further relief; or review it, even for apparent error, upon any matter decided on appeal . . . ."
>
> * * *
>
> A lower court may decide "matters left open" only insofar as they reflect proceedings consistent with the appellate court's mandate.

(Citations omitted.)

pointed out that the district court accepted the affidavit of Green's former attorney, Freedman.

Yet, given the holding by the Court of Appeals, the district court had to accept that Green's use of the statement "bona fide purchase for value" was not reasonable. The judge could, of course, hear evidence presenting "extraordinary circumstances" which would have justified Green's making of an unreasonable statement in a pleading. However, Green only offered evidence attacking the finding by the Fourth Circuit. In contrast, Green's attorney, Freedman, offered an affidavit explaining why he should not be sanctioned given that his signature appeared on a pleading with an unreasonable statement in it (his position was that he was misled by Green). He did not limit his approach,

as Green has done, to an attack on the prior appellate court ruling.

Proceeding to a further argument made by Green, he has argued that the procedural disposition of the case has prevented him from presenting evidence to prove that he was a valid bona fide purchaser of the note and that the debt should not have been extinguished. He seeks relief from judgment under Fed. R. Civ. P. 60(b) because "such action is appropriate to accomplish justice." First, the evidence offered by Green does not necessarily show that he was a bona fide purchaser of a valid note. Second, he had ample opportunity to present evidence establishing his contention before, and the finality of the judgment should not be disturbed by his decision to attempt to do so at a very late date.

Green has sought to present evidence to show that the notes were purchased on Green's behalf using the personal accounts of Silverstein and Zimpel and not the partnership's account. He argues that the deposits by Silverstein and Zimpel into the partnership account and subsequent reversing withdrawal had nothing to do with the purchase of the notes. Green has also emphasized that Silverstein was only a limited partner and not a guarantor of either note (so he was not personally liable). Yet even under such circumstances, Virginia law would extinguish the debt and release the guarantors.

As pointed out in our earlier Fourth Circuit opinion, after "the payment of a note by the maker . . . there can be no recovery against an accommodation maker or a surety." 856

F.2d at 655 (citation omitted). The funds used to pay the notes came from the partners. While the partnership is a distinct legal entity, Zimpel was personally liable for the debt.[6] Payment by him was sufficient to release the guarantors.[7] Green apparently has recognized that, had Silverstein and Zimpel bought the notes in their own names with personal funds, the debt would have been retired. The incidental insertion of Green's name on the check acquired with personal funds of Silverstein and Zimpel should make no difference.

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[6] The bulk of the notes (about $200,000) was repaid by Zimpel, a general partner and guarantor.

[7] Under § 8.3-601(3) of the Virginia Code, "[t]he liability of all parties is discharged when any party who has himself no right of action or recourse on the instrument reacquires the instrument." Zimpel may have had a right of recourse under the partnership agreement for contribution, but not on the note.

The second problem for Green is that he did not present his "new" evidence until after the Court of Appeals had ruled for Foley. It is true that the evidence relied upon by us (the December 14, 1984, letter from Green to Silverstein and Zimpel and deposition testimony from the state court proceeding) was presented by Foley only after the summary judgment hearing in the lower court (in a motion to vacate summary judgment). The lower court refused to reopen the judgment, and the evidence was not formally admitted into the appellate record until the decision was issued by the Court of Appeals. Green has asserted that he felt constrained to abide by the original record for appeal and was merely following the rules in not offering additional evidence outside the record.

Of course, the parties should as a general matter confine themselves to the official record. Yet special circumstances will justify a departure from the rules. Here, when Foley moved to reopen the judgment in the district court based on newly discovered evidence, Green should have alerted the court if he had additional evidence showing that Foley's evidence was inaccurate. Again, when Foley pressed the issue to the Court of Appeals, Green should have informed us of his additional evidence.[8] Barring exceptional circumstances not present here, the interests of finality and expeditious litigation are best served by enforcing the judgment as it stands.

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[8] It defies credulity to believe that Green would have withheld exculpatory evidence. He could have filed a motion to supplement the appellate record pursuant to Fed. R. App. P. 10(e) and I.O.P. 10.4.

We next have occasion to deal with Green's contention that the district judge's refusal to allow him to introduce further evidence concerning the transfer of the notes denied him due process of law. Due process does require that the party being sanctioned receive notice and an opportunity to be heard. See, e.g., Donaldson v. Clark, 819 F.2d 1551, 1559 (11th Cir. 1987). The existence of the rule gives some notice, at least to attorneys.[9] Moreover, Foley's allegations of misrepresentation when he moved to vacate summary judgment and when he later moved for sanctions under Rule 11 gave Green sufficient notice.

While the attorney should have an opportunity to be heard, a separate

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[9] See Donaldson, 819 F.2d at 1560. While Green is a plaintiff in the instant case, he is also an attorney, presumably cognizant of court rules.

evidentiary hearing is not usually required before imposing Rule 11 sanctions. See Advisory Committee Note to Rule 11. The scope of the hearing should depend on the seriousness of the potential sanction and the probative value of further factual inquiry.[10] Green received an opportunity to be heard, albeit only through oral argument. The contention has been made that a factual dispute exists which requires an evidentiary hearing. Specifically, Green has alleged that a factual dispute exists over his "alleged" misrepresentations to the court in stating that he was a bona fide

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[10] A number of courts have held that a hearing is not necessary. See e.g. Oliveri v. Thompson, 803 F.2d 1265, 1380 (2d Cir. 1986) (judge's participation in proceedings sufficient to satisfy due process), cert. denied, 480 U.S. 918 (1987), and Donaldson, 819 F.2d at 1558 (suggesting a balance test similar to that found in Mathews v. Eldridge, 424 U.S. 319 (1976)).

purchaser. He has claimed to have evidence justifying that claim.

The assertion amounts to no more than an attempt to rehash the issues just presented. Green's complaint has been that he did not have an adequate opportunity to present his side of the story. He has argued that he merely followed the rules of confining his arguments to the original record and is now being penalized without a proper hearing. However, the relevant evidence has already been included in the record.

Even if it had not been, Green waived his opportunity to present the evidence by not offering it earlier. He had an opportunity to present his evidence when he responded to Foley's motions for relief from judgment and when he defended the appeal by Foley and chose not to take advantage of that

opportunity. Thus, Green waived his right to present his story through his own inactions. Due process only requires an opportunity to be heard, which Green had in the prior proceedings. An additional evidentiary hearing is not necessary.

Next, Green has argued that the imposition of sanctions was not justified. Fed. R. Civ. P. 11 authorizes the court to impose sanctions if an attorney or party signs a pleading without making reasonable inquiry to establish that it was well-grounded in fact, warranted by existing law or a good-faith extension, and not motivated by an improper purpose.

Green has returned to his claim that he was a "bona fide purchaser for value" asserting that his claim was either true or, if in error, it was harmless. He again has contended that

he did buy the notes by cancelling the $10,000 in fees owed by Silverstein and Zimpel.[11] In addition, he has contended that the term "bona fide purchaser" has no legal meaning in Virginia, claiming that its use was "inartful," but immaterial to the case. He has indicated that to him it is unclear under Virginia law whether the transaction should have extinguished the debt. Green should, before entering a Virginia transaction, whether a Pennsylvania lawyer or a Virginia lawyer, have made himself aware of the Virginia law's niceties. Green has emphasized that the district court ruled in his favor, even after receiving the information relied upon by the Court of

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[11] When one clears away the debris, however, it is fairly clear that Green really bought the notes from Silverstein and Zimpel, not from the bank. The notes were legally cancelled while passing through the hands of the two partners.

Appeals. In light of those circumstances, he has argued, it was objectively reasonable for him to file suit and claim to be the equivalent of a "holder." Green's argument, however, runs into the face of the holding by us as a panel of the Court of Appeals that Green misrepresented the facts. Once again, Green is attempted to re-argue the merits of the prior appeal and they are no longer open to dispute.

Green has also sought to make the point that, even if the claim was not reasonable, he reasonably relied upon his counsel, Freedman, a Virginia lawyer. He has tried to cast all responsibility upon his attorney since a lawyer is generally responsible for the pleadings and making legal judgments. Again, we hear of Green's ignorance of Virginia law on the transaction and of

reliance on his attorney.[12] Two considerations weigh against accepting such an argument. First, Green is himself an attorney who appears to have done substantial work on the case.[13] Second, it appears that Green failed adequately to inform his counsel, at least initially, by not disclosing exactly how he acquired the notes. Green could not have reasonably relied on Freedman's judgment when Green intentionally withheld crucial information about the transaction.

As a final consideration on the issue, we, at the time of the prior

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[12] We need not rely on the oft repeated truism that ignorance of the law is no excuse. The failure to reduce the risk by seeking knowledgeable advice counts for as much as the fact itself of ignorance of the law.

[13] In his affidavit, Green has stated that his firm drafted the reply to Foley's motion to dismiss and Green's summary judgment motion.

appeal, reacted in part to what appears to have been bad faith by Green, Silverstein and Zimpel. The three appeared to have conspired to evade a clear precept of Virginia law at Foley's expense. Such bad faith is a relevant consideration in a Rule 11 proceeding.[14]

Green has complained that it was illogical to impose sanctions on him and not on his attorney. He has asserted that Freedman had all the pertinent information about the purchase of the note by June 19, 1987. If it were unreasonable for Green, a Pennsylvania attorney, to prosecute the

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[14] Green also has presented the argument that Foley had a duty to notify him about the presence of a Rule 11 issue. Such notice would have "prompted Green and his counsel to take a closer look at the situation." However, Foley alleged "misrepresentation" immediately after the summary judgment proceedings when he discovered evidence that the funds to purchase the notes came from Silverstein and Zimpel. That allegation should have been sufficient to put Green on notice of a potential Rule 11 violation.

claim, the theory runs, then it must have been unreasonable for Freedman to sign the pleadings, at least after June 19, 1987. Even in his affidavit in defense against Foley's motion for sanctions, Green has argued, Freedman indicated that he still believed that Green had a valid claim, intimating that Freedman may have intentionally signed pleadings under a belief which we have held to be unreasonable.

It is not usual for a court to impose a sanction only on the client,[15] but here, as elsewhere, circumstances may alter cases. Review, to succeed in reversal, is limited to a showing of an abuse of discretion. Freedman has indicated that Green misled him about the purchase of the notes. Thus, when Freedman found out the true

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[15] See Vairo, Rule 11: A Critical Analysis, 118 F.R.D. 189, 227 (1988).

circumstances in the midst of the proceedings, his obligations were far more complicated than in the beginning. Without exploring all the aspects of Freedman's ethical duties, it doe snot seem an abuse of discretion for the district court to have regarded Green as more responsible than Freedman.

On his appeal, Foley used the December 14, 1984, letter from Green to Silverstein and Zimpel to show that Green's claim to be a "bona fide purchaser for value" was false. Green has contended that the deposition of David Gunn, the bank official at Sovran, calls into question the accuracy of the evidence Foley used to show misrepresentation. He suggests that Gunn's deposition indicates that Silverstein and Zimpel used their personal funds to purchase the notes, not partnership funds. Green argues

that because Foley knew about his other evidence and did not call it to the attention of the court, Foley violated Rule 11.

The argument, however, fails because Gunn's deposition did not clearly contradict the evidence used by Foley. Gunn indicated that he debited the personal accounts of Silverstein and Zimpel to pay for the cashier's check in Green's name. He also said that he did not know about the deposits to the partnership account and withdrawal of funds by Silverstein and Zimpel just prior to the purchase of the notes. Gunn hence did not know all of what Silverstein and Zimpel were doing and his deposition testimony therefore has no bearing on the legal ramifications of their actions.

Finally, both sides contest the monetary size of the sanction. The

size of the award should be altered only in the case of an abuse of discretion. Cabell v. Petty, 810 F.2d 463, 466 (4th Cir. 1987) ("While some sanction is required when an infraction occurs, the determination of what is 'appropriate' is still a matter left to the sound discretion of the district court."). Green has protested the sanction as excessive. He has also contended that the court should only consider legal expenses for actions in federal court, and not those incurred in the state proceeding.

Foley, on the other hand, has argued that the award is insufficient to deter others from committing similar violations. Foley further has contended that other punishments, such as state bar disciplinary proceedings, should not be considered as ameliorating factors by the court in imposing sanctions. Foley

has asked for all legal costs from proceedings related to Green's claim, including those in state court (a total of over $80,000).

The primary purpose behind Rule 11 is to punish violators and deter parties and their counsel from pursuing unnecessary or unmeritorious litigation. Cabell, 810 F.2d at 467.[16] A sanction should be sufficient to deter such conduct if it is greater than the benefit to the party or attorney after discounting for the probability that no

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[16] While Rule 11 also serves to compensate the opposing party for the costs of such litigation, see Harris v. Marsh, 679 F. Supp. 1204, 1390 (E.D.N.C. 1987), vacated in part on other grounds, 123 F.R.C. 204 (E.D.N.C. 1988), "[t]he rule provides for sanctions, not fee shifting. It is aimed at deterring and, if necessary, punishing improper conduct rather than merely compensating the prevailing party." Anschutz Petroleum Marketing v. E.W. Saybolt & Co., 112 F.R.D. 355, 357 (S.D.N.Y. 1986), quoting Schwarzer, Sanctions Under the New Federal Rule 11—A Closer Look, 104 F.R.D. 181, 185 (1985).

sanction will be imposed.[17] From the point of view of deterrence, the court should consider all of the costs which Green will bear for his actions (including potential bar disciplinary proceedings). Otherwise, the total penalty faced by Green could be more than "the lease severe sanction adequate to serve the purpose. . . ." Cabell, 810 F.2d at 467.

The deterrence rationale of the Rule also suggests that the court should consider the entire case, including related state court proceedings. Green has admitted that the state court litigation was initiated to facilitate his federal claim. Thus,

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[17] The same principle was employed by Learned Hand in his famous BPL formula (negligent if the Burden of taking care is less than the potential Loss multiplied by the Probability of occurrence). See United States v. Carroll Towing Co., 159 F.2d 169 (2d Cir. 1947).

in a broad sense, it "stemmed from" the signing of a pleading in federal court. Introcaso, 857 F.2d at 970.[18] However, other policy considerations suggest that a federal court should not impinge on state proceedings unless necessary.[19] Therefore, it is appropriate to limit the court's consideration to legal fees in the federal system (at both the district and appellate level). Thus, the district court acted within its discretion when it excluded

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[18] Foley has suggested that the opinion in Introcaso meant to include all proceedings "stemming from" the improper signing of a pleading. However, the opinion in Introcaso does not appear to have considered the including of state court proceedings in considering sanctions. The facts of the case certainly did not present that issue to the court.

[19] Cf. Foyal v. First Nat. Bank of Commerce in New Orleans, 841 F.2d 126, 130 (5th Cir. 1988) ("Rule 11 does not apply to conduct that occurred in state court before removal"). Moreover, the state court may have procedures for imposing sanctions of its own.

consideration of Foley's expenses from the state court proceedings.

The district court awarded Foley $20,000 without an in-depth investigation of the reasonableness of the attorneys' fees claimed by Foley. The award is not too small because the judge properly considered other punishments Green will face and compensation is not the primary purpose.[20] The award is not too large, because Green's conduct was sufficiently egregious to warrant a significant sanctions.[21]

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[20] Foley's assertion in his brief that the district judge "ignored" evidence inculpating Green is baseless. The judge weighed that evidence against other considerations in reaching the $20,000 figure.

[21] Green has argued that attorney fees should only be considered before July 30, 1987, the date when the district court refused to grant Foley relief from summary judgment. His argument is that because the court had access to the evidence of Green's misrepresentation and nonetheless refused Foley's motion, Green's actions could not have been unreasonable. The issue is of doubtful relevance because the

Nor did the district court err by failing to examine the reasonableness of the fees claimed by Foley.[22] The judge awarded only a quarter of the claimed fees and the size of the expense, given the extent of litigation which has transpired, stands revealed upon a cursory investigation. Foley's reasonable legal fees must have been in excess of $20,000.[23]

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district judge only awarded a portion of Foley's attorney fees. In addition, our decision on appeal held that Green's position was without merit.

Green has sought to create an unmet duty which would require Foley to have filed his Rule 11 motion at the same time as he filed his Rule 60(b)(3) motion for relief from judgment in October 1987.

[22] Even if the district court failed to make sufficiently detailed findings concerning the amount of the award, the findings of fact were nonetheless sufficient for the lower court to have decided that some sanction was appropriate.

[23] Because the award did not exceed Foley's expenses, we need not consider the question of whether Green would be entitled to additional procedural protections if the award

In conclusion, Green's basic argument has been that he had a reasonable basis for believing, when he made the allegation, that he was a "bona fide purchaser of the notes for value." The district court properly limited his attempts to reopen the merits of that issue. The sanction imposed was reasonable under the circumstances and does not constitute an abuse of discretion. Therefore, the judgment of the district is, in all respects,

AFFIRMED.

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did exceed those expenses.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 88-2666
No. 88-2667

GARY GREEN,

Appellant,

v.

MAURICE P. FOLEY,

Appellee.

MOTION FOR DISQUALIFICATION

Pursuant to Rule 27 of the Federal Rules of Appellate Procedure and 28 U.S.C. Sec. 455(a), Appellant, Gary Green, does herewith move and petition the Court to disqualify from consideration of this appeal the members of the panel who participated in the

decision of this Court in No. 87-2639, dated September 13, 1988, Foley v. Green, 856 F.2d 660; and, as grounds therefor, does state as follows:

1. On September 13, 1988, Chief Judge Winter and Circuit Judges Murnaghan and Sprouse issued a decision in No. 87-2639, Foley v. Green, 856 F.2d 660 (4th Cir. 1988), reh. denied, October 14, 1988, petition for certiorari filed, January 11, 1989.

2. The Court found, inter alia, that Green had defrauded the district court by withholding evidence and misrepresenting the nature of a transaction by which he had become the holder of a note guaranteed by Foley.

3. The Court's opinion (Exhibit 1) contains a number of pejorative conclusions regarding Green.[1]

4. Circuit Judge Murnaghan thereafter sent a letter to the Disciplinary Board of the Pennsylvania Supreme Court (Exhibit 2), calling its attention to what he regarded as Green's professional misconduct. Judge Murnaghan states that Judges Sprouse and Chief Judge Winter approved the letter as well.

5. On December 2, 1988, acting pursuant to Rule 11 of the Federal Rules of Civil Procedure, the district court awarded Foley $20,000 in sanctions against Green. (Exhibit 3).

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[1] For example, Green was found by the court of appeals to be "part of a scheme [involving] Foley's business partners," Slip Op. at 2; a "Philadelphia lawyer" engaged in "sharp" practices, Slip Op. at 7, n. 4; who "had no intention of disclosing the true manner in which he obtained the notes . . .," Slip Op. at 9; and "left his erstwhile clients exposed to double indemnity . . . ." Slip Op. at 6, n. 2.

6. The sole basis for the sanctions against Green was this Court's findings of fact on the previous appeal. (Exhibit 4).

7. The propriety and sufficiency of the sanctions against Green are the sole issues in the pending appeal.

8. Petitioner is of the understanding that the custom, policy, and practice of the court is to have the same panel consider any issues which arise subsequent to the disposition of a case. (Exhibit 5)

9. Petitioner respectfully submits that, if the pending appeal is heard by the same panel, the previous findings of the Court and the subsequent conduct of Judge Murnaghan are such as will either deprive Petitioner of a full hearing of his appeal before a fair and impartial tribunal or create the appearance of impropriety.

10. Petitioner respectfully submits that such circumstances create a situation in which the impartiality of the panel might reasonably be questioned. See, e.g., Textor v. Board of Regents, 711 F.2d 1387 (7th Cir. 1983) (public statements regarding propriety of counsel's conduct contributed to denial of a meaningful hearing on sanctions). See generally In re Murchison, 349 U.S. 133 (1955).

11. Petitioner respectfully submits that, under the circumstances, the assignment of this appeal to a different panel is required by 28 U.S.C. Sec. 455(a) and is in the interest of justice.

CONCLUSION

For the reasons set forth above, Petitioner respectfully requests that this motion be granted and the pending appeal be assigned to a panel consisting of Circuit Judges who were not involved in the September 13, 1988 decision in No. 87-2639.

Respectfully submitted,

/s/ Philip L. Chabot, Jr.
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Counsel for Appellant

February 1, 1989

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 88-2666
No. 88-2667

Gary Green,

Plaintiff - Appellant,

v.

Maurice P. Foley,

Defendant - Appellee.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Albert V. Bryan, Jr., District Judge.

Upon consideration of appellant's motion for disqualification and appellee's response to the motion,

IT IS ORDERED that the motion for disqualification is denied.

For the Court

/s/ John M. Greacen
Clerk

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PUBLISHED

No. 87-2639

GARY GREEN,

Plaintiff-Appellee,

versus

MAURICE P. FOLEY,

Defendant-Appellant.

No. 87-2685

GARY GREEN,

Plaintiff-Appellee,

versus

MAURICE P. FOLEY,

Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Albert V. Bryan, Jr., Chief Judge. (CA-87-350).

Argued: 7/5/88 Decided: 9/13/88

Before WINTER, Chief Judge, and MURNAGHAN and SPROUSE, Circuit Judges.

John Raymond Hartnett (BRINCEFIELD & ASSOCIATES, P.C. on brief) for Appellant. Lawrence Eliot Freedman for Appellee.

MURNAGHAN, Circuit Judge:

The appellee, Gary Green, tries to portray the case as involving an ordinary commercial transaction in which a guarantor (appellant Maurice P. Foley) is simply trying to duck liability on a note. The attempted characterization is far from accurate. In fact, Green has been part of a scheme with two of Foley's business partners (Alan Silverstein and Stephen M. Zimpel), in which the two partners have paid off $29,647.81 in partnership indebtedness and caused the uncancelled notes to be given to Green. Green subsequently has tried to collect the facts value of the notes from Foley, the third partner in the partnership, who signed the partnership notes as a guarantor.

Green repeatedly has stated in his court pleadings and arguments that he was a bona fide purchaser of the notes

for value. Green claims he took the notes for value because Silverstein and Zimpel owed him $10,000.00 in legal fees for services unrelated to the partnership. Green has further claimed that the notes were properly discounted from their face value of nearly $300,000 because Green assumed the risk that Foley would be unable to make good on the guaranty.

Green is, in fact, far from an innocent holder of the notes, however. Foley discovered the true nature of transaction between his partners and Green only after the hearing on the cross-motions for summary judgment. Foley's lawyer received, as part of discovery, the letter outlining the arrangement between Green and Foley's partners only on the morning the motion for summary judgment was being argued (he received the material after arriving

in the courtroom and did not read the papers until after the hearing); he then examined Zimpel in a deposition and discovered the true nature and extent of the transaction. Until Foley obtained the letter outlining the actual agreement between Green and Foley's partners, Foley had no way of knowing that the money used to "purchase" the notes from the banks was actually money supplied by Zimpel and Silverstein. And until Foley's attorney questioned Zimpel in a deposition, he had no way of knowing that the money used was first put into the partnership bank account in order to retire the notes and was then withdrawn.

Meanwhile, summary judgment had been granted to Green on his claim. Foley sought relief under Fed. R. Civ. P. 60(b)(3), but the district judge ruled that the letter was "neither newly

discovered evidence or fraud that would warrant any relief from the judgment."[1] We disagree.

The new evidence about Green's relationship with Foley's partners reveals the silk purse and sow's ear characteristic of the transaction. The belated disclosure that Foley's partners supplied the money (via the partnership account) to pay Sovran Bank gives Foley a meritorious defense to Green's claim. As discussed more fully below, under Virginia law, the note held by Sovran Bank was extinguished because it was

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[1] "Newly discovered evidence" is, of course, a separate reason contained in Fed. R. Civ. P. 60(b)(2) for granting relief from judgment when the discovery is not made, despite due diligence, in time to move for a new trial under Fed. R. Civ. P. 59(b). Foley sought relief only under Rule 60(b)(3), which requires instead of fraud, misrepresentation, or other misconduct of an adverse party. However, we note that the fact that evidence exposing misconduct by an adverse party was newly discovered after judgment despite due diligence obviously should have a significant impact on the court's evaluation of whether relief from judgment under Rule 60(b)(3) is warranted.

paid with partnership funds. See Va. Code Ann. §50-8 (1986). Even if the money had not gone through the partnership account, the note would have been extinguished because it was paid by its makers (Zimpel and Silverstein). Whitehead v. Planters Bank & Trust Co., 180 Va. 76, 21 S.E.2d 724 (1942).

Because the newly discovered evidence corrects material misrepresentations in Green's pleadings and gives Foley an ironclad defense of payment, we conclude that the district court abused its discretion in denying relief from summary judgment under Fed. R. Civ. P. 60(b)(3). We therefore reverse and remand in order that summary judgment may be entered for Foley, as there are no material disputed facts remaining.

I.

Foley, Zimpel, and Silverstein were partners in Fairfax Associates, Ltd. ("the partnership"). Zimpel and Foley were general partners, each with a 40% interest, and Silverstein was a limited partner with a 20% interest. Zimpel was Managing General Partner.

The Partnership executed notes with two banks. In 1982, Foley and Zimpel signed a note on behalf of the partnership for $7,800.000.00 to secure a loan from Mount Vernon Savings & Loan Association. Mount Vernon's successor is Crossland Savings Bank ("Crossland"). Foley, Zimpel, and their spouses executed a guaranty agreement promising to make good on the Crossland note.

On January 28, 1983, Foley and his wife executed a guaranty agreement with Virginia National Bank (successor; Sovran Bank) promising to make good on

any loan made to the partnership up to $221,500. On September 4, 1984, Zimpel executed a note on behalf of the partnership to Virginia National Bank to secure a loan for $260,000, with payment due December 3, 1984. An additional $40,000 loan seems to have been made by Sovran Bank to the partnership; that loan was guaranteed by Zimpel and Silverstein but not by Foley.

Gary Green provided legal counsel to Zimpel and Silverstein in matters unrelated to the partnership. For the representation Zimpel and Silverstein owed Green $10,000. On December 14, 1984, Green sent a letter to Silverstien and Zimpel detailing their agreement regarding satisfaction of the $10,000 debt through assignment or purchase in Green's name of negotiable partnership notes that had been guaranteed by Foley. In the letter (reproduced as an appendix

to this opinion), Green noted that Silverstein and Zimpel "offered to buy the notes and guarantees from the banks in my name in order to free up your lines of credit on the one hand, and to pay your debt to me on the other." Outlining their agreement, the letter provided that Zimpel and Silverstein would "purchase in or have assigned to [Green's] name" certain notes guaranteed by Foley with a net amount due in excess of $275,000. The notes and guarantees were not to be marked cancelled, and Zimpel and Silverstein were to pay the "costs of acquiring the notes and guarantees and of enforcing them", unless Green elected to assume the costs of enforcement. Green was to receive anything collected on the notes and guarantees without regard to whether Foley could successfully pursue Zimpel and Silverstein for contribution or

other claims involving the partnership or the notes: "In other words," Green concluded, "I will retain whatever I recover from Foley without regard to what occurs between you and Foley."[2]

On December 31, 1984, Zimpel deposited $219,256.42 of his own funds into the partnership bank account. The same day, Silverstein deposited $93,967.05 of his own funds into the partnership account. Zimpel testified in his deposition,[3] "Alan Silverstein and I deposited the money from our personal accounts into Fairfax Associates account in preparation for

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[2]Green thus left his erstwhile clients exposed to double liability on the notes, a highly questionable act by an attorney whether or not Zimpel and Silverstein fully perceived their peril.

[3]Zimpel's deposition was taken October 6, 1987 (three months after the summary judgment hearing in the present case), in connection with Green v. Stephen Zimpel, Marilyn Zimpel, & Fairfax Associates, Ltd. (Law No. 76682), a related case in the Fairfax County Circuit Court in Virginia. See infra at 11.

retiring debts of Fairfax Associates. We subsequently had discussions with our counsel in Philadelphia[4] . . .Mr. Green. . . And subsequently took the money back out of the Fairfax Associates and proceeded in another manner."

The same day, December 31, 1984, Zimpel and Silverstein took the money (totaling $313,223.47) out of the partnership account, put it back in their personal accounts, and then purchased a cashier's check for the amount in Gary Green's name. Green used the $313,223.47 cashier's check to purchase the partnership's notes from Sovran Bank. In his complaint in the instant case, however Green merely asserted:

> Plaintiff stands in the shoes of the bank. Plaintiff was bona fide purchaser of the

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[4] The deserved reputation of Philadelphia lawyers for astuteness has hardly manifested itself here. The activities have been sharp rather than astute.

> notes for value from the payees and holders of the notes. Defendant Maurice P. Foley owes to Plaintiff the amount of said note and interest.

In the memorandum supporting his motion for summary judgment, Green said,

> In January, 1985 and February, 1985, Plaintiff Gary Green purchased the MOUNT VERNON NOTE from Crossland Savings Bank. . .by paying $31,647.81. . .

In sworn affidavit on June 4, 1987, Green stated that he had "acquired all of the rights" to the Crossland and Sovran notes, "upon the payment" of $31,647.81 and $260,000, respectively. Thus, until he received a copy of the December 14 letter and took Zimpel's deposition, Foley did not know that the funds used by Green to "purchase" the notes from the two banks had been provided by Foley's partners, and that at least some of the money (the money

used to purchase the Sovran notes) had passed through the partnership account.[5]

Foley knew nothing of the December 14 letter until after July 2, 1987 district court hearing on the parties' cross-motions for summary judgment. Foley's counsel received the discovery material after he arrived in the courtroom for the hearing, and did not read the letter until after the hearing. In his brief to this Court, Green asserts that Foley's counsel "was served with a timely Response to Foley's Request for Production of Documents." Green's assertion that the letter was produced in a timely fashion is

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[5]The source of the funds used to purchase the Crossland note and the fate of the second Sovran note (for $40,000) are not clear from the record. It appears that Zimpel and Silverstein were the source of all monies used to pay the partnership's notes, and it appears likely that one of them took custody of the smaller Sovran note (which had not been guaranteed by Foley). We need not be concerned with such factual uncertainties, however, because the two notes are not at issue in the present appeal.

seriously undermined by the statement made by his attorney:[6]

> I'll tell you frankly that the reason the letter was produced was because I in error allowed it to be produced, and having let the cat out of the bag it was gone and there was nothing else I could do about it. I've had to live with it ever since.

It is thus apparent that Green had no intention of disclosing the true manner in which he obtained the notes and correcting the misrepresentation in his pleadings.

On October 6, 1987, Foley's counsel took Zimpel's deposition and questioned him about the transaction with Green and the December 14, 1984 letter. The

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[6] The attorney's statement was made during the Zimpel deposition, which was taken in connection with a related case in Fairfax County Circuit Court. See supra note 3. This portion of the deposition transcript was not part of the original record on appeal. It was, however, attached to a letter sent by counsel after oral argument. We have treated the letter as a motion to supplement the record and hereby grant the motion.

deposition for the first time revealed the full nature of the transaction between Green and Foley's partners. In his deposition, Zimpel testified in part:

> A. The transaction of depositing the money into Fairfax Associates was in preparation for curtailing that debt. . . . Alan and myself were feeling very wrong that we were curtailing, the two of us were curtailing debts of the partnership that were the responsibility of all three partners and not just two partners. It was in a discussion of that particular feeling of Mr. Foley's lack of participation and responsibility for the debts of Fairfax Associates that we were discussing with Mr. Green, our Philadelphia attorney, when he reminded us of a - -
>
> [interruption by counsel, who noted that substance of conversation was privileged]
>
> Q. Why does Gary Green's name appear on the cashier's check?
>
> . . .
>
> A. Mr. Green was retiring the debt. . . . Mr. Green was receiving the note in return

for fees and services that we owed to him, our feeling being that at the time that Mr. Foley was not going to participate, that he probably didn't have any assets, and for us to pursue Mr. Foley would be an expense on top of already tremendous expenses, and by being able to curtail the debt with the payoff of that note we felt like that time we were coming out of a bad situation a little bit better allowing Mr. Green to pursue that note.

. . .

[conferred with counsel]

A. The cashier's check for the $313,223.47 represents the retirement of the debt of Fairfax Associates with Sovran Bank. The note for that debt was used to retire our debt with Mr. Green.

[lawyers discussed use of word "retire"; Zimpel was asked what he meant in context; Zimpel conferred with counsel and stated:]

A. I mean the paying off of the debt, not the cancelling of the note.

Q. Well, the note in fact was never canceled, was it?

A. No.

> Q. And one of the reasons it wan not canceled was because you instructed Sovran Bank specifically not to cancel the note; isn't that correct?
>
> [question repeated]
>
> A. Yes, that's correct.

On August 22, 1986, Green sued the Foleys[7] in the District Court of Maryland on their guaranties on the $260,000 Sovran note ($221,500 guaranteed by the Foleys) and the $31,647.81 Crossland note (fully guaranteed by the Foleys and the Zimpels). The claim was for the full amount guaranteed, not merely the 40% obligation of Foley as a partner. Foley's motion for a change of venue was to Eastern District of Virginia was granted. In October, 1986, Foley demanded that Green institute suit against the partnership, as the

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[7] Mrs. Foley was dropped from the suit at an early stage.

principal debtor, for collection of the two notes. Pursuant to Va. Code Ann. §§49-25 & 49-26 (1986), Green filed suit against the partnership and the other guarantors in Fairfax County Circuit Court. Green v. Stephen Zimpel, Marilyn Zimpel, & Fairfax Associates, Ltd. (Law No. 76682). Although he was a necessary party, Foley was neither named in the Fairfax suit nor notified of its existence.

Foley argued below that he was entitled to summary judgment on both counts because Green did not diligently pursue the suit in the Fairfax court, as required by Virginia law. See Va. Code. Ann. §49-26 (1986) (after demand by surety, if creditor does not institute suit against solvent parties to contract "and prosecute the same with due diligence," creditor forfeits right to demand payment from surety). The

district court dismissed the Crossland note claim because Green had failed to prosecute the Fairfax suit with diligence (no discovery had yet been taken, for example). Green has not appealed that ruling. However, the district court found that Foley had specifically waived that statutory right in the guaranty he signed on the Sovran note. The district court then granted Green summary judgment on the Sovran note claim.

Foley filed a Motion for Reconsideration/Motion to vacate pursuant to Fed. R. Civ. P. 69(e) based on unfair prejudice due to Green's untimely filing and service of his Response to Foley's Motion for Summary Judgment; the motion was denied. Foley then filed a Motion for Relief from Judgment under Fed. R. Civ. P. 60(b)(3), alleging that material

misrepresentations contained in Green's pleadings and motions prevented Foley from presenting a meritorious defense of payment before the entry of summary judgment. After a hearing, that motion was also denied. Foley now appeals the denial of both motions.

II.

To obtain relief under Fed. R. Civ. P. 60(b)(3), the movant must (1) have a meritorious defense, (2) that he was prevented from fully presenting before judgment, (3) because of the adverse party's fraud, misrepresentation, or misconduct. Square Construction Co. v. Washington Mertopolitan Area Transit Auth., 657 F.2d 68, 71 (4th Cir. 1981). In considering those requirements, "the court must balance the competing policies favoring the finality of judgments and justice being done in view of all the facts." Id.

The standard of review for denial of relief under Rule 60(b) is abuse of discretion by the district court. United States v. Williams, 674 F.2d 310, 312 (4th Cir. 1982); Central Operating Co. v. Utility Workers of America, 491 F.2d 245, 252 (4th Cir. 1974); 11 Wright & Miller, Federal Practice and Procedure §2872 (1973). The district judge concluded here that the letter and deposition were "neither newly discovered evidence or fraud that would warrant any relief from the judgment that is requested. This is evidence that was known or could easily have been determined with due diligence at the time of the original hearing." We disagree.

A.

Armed with the Green letter and Zimpel deposition, Foley has meritorious

defense of payment. The Virginia Supreme Court has stated:

> "The transfer of a note to the maker or a bill to the acceptor, at or after maturity, extinguishes the instrument; likewise, the payment of a note by the maker . . .at or after maturity, extinguishes the instrument cannot be reissued so as to confer any rights upon the transferee as against a party who had nothing to do with the reissuance. One who thereafter takes the instrument takes subject to the defense of payment. There can be no recovery against an accommodation maker or a surety. The maker cannot reissue the note so as to render an endorser liable to a subsequent holder. Even though the maker has the note endorsed by the payee and transferred to a third person, such person cannot recover of an accommodation maker. * * *"

Whitehead v. Planters Bank & Trust Co., 180 Va. 76, 81-82, 21 S.E.2d 724, 727 (1942) (emphasis added) (quoting a commentator). See Grizzle v. Fletcher, 127 Va. 663, 667, 105 S.E. 457, 458 (1920) ("A person cannot buy his own

debt without extinguishing it. Of course, the creditor may sell the judgment to a third person, but not to one of the judgment debtors so as to keep it alive at law.")

The Sovran note has been retired, releasing Foley from his role as guarantor, because partnership money was used to pay off the bank. Zimpel and Silverstein put the $313,000 into the partnership account and then withdrew it to purchase the cashier's check in Green's name. Under Virginia law, "All property originally brought into the partnership stock or subsequently acquired, by purchase or otherwise, on account of the partnership is partnership property." Va. Code Ann. §50-8- (1986). By the terms of the statute, any money intentionally deposited in the partnership account becomes partnership property.

In his Brief to the Court, Green claims that Zimpel and Silverstein made a "mistake" when they put the money into the partnership account, and argues that the money never became partnership property because Zimpel and Silverstein intended "to specifically not extinguish the partnership debt (as would occur if the partnership had the money to pay off its own debt) and to have the entire partnership debt, including the guarantees, assigned to Green." Appelle's Brief at 17 (emphasis original). However, Zimpel testified in his deposition that he and Silverstein put their money into the partnership account "in preparation for retiring debts of Fairfax Associates":

> A. The transaction of depositing the money into Fairfax Associates was in preparation for curtailing that debt [the Sovran notes].
>
> Q. Meaning it was going to pay the debt off, correct?

A. Yes.

It is thus clear the Zimpel and Silverstein deposited the money with the intent to retire the partnership's debts. The funds, once deposited, therefore became partnership property. Green's assertion that the money was deposited by "mistake" may be correct in that he and his erstwhile clients subsequently regretted the action, but it is clear that inadvertence was not involved at the time the deposit was made.

Even if the funds used to pay Sovran are not deemed by law to be partnership funds, Green acted as an agent for Zimpel and Silverstein, and retired the debt when he paid the banks for the partnership's notes. Green is correct in arguing that the intention of the party making the payment is controlling, but only where the payor is

a third party to the debt. See Union Trust Corp. v. Fugate, 172 Va. 82, 89, 200 S.E. 624, 627 (1939) ("whether payment by a third person operates as a discharge of the instrument, or as a purchase vesting title in the payor, depends on the payor's intention.") Here, the payment was made by the makers of the note. As partners, Zimpel and Silverstein and Foley are jointly liable for all debts and obligations of the partnership. Va. Code Ann. §50-15(b) 1986.

In addition, when one partner acts within his authority, his actions are actions of the partnership and bind the partnership. Va. Code Ann. §50-9 (1986) ("[e]very partner is an agent of the partnership for the purpose of its business"); Holloway v. Smith, 197 Va. 334, 88 S.E.2d 909 (1955). Even though the cashier's check was in Green's name,

Zimpel and Silverstein controlled the transaction and instructed the bank with regard to disposing of the notes. Zimpel testified in his deposition that he had instructed Sovran Bank not to cancel the $260,000 note. And, it appears that Zimpel or Silverstein took possession of the smaller Sovran note, even though it had obstensibly been "purchased" from Sovran by Green. See supra note 5. It all adds up to the type of sham transaction that releases the surety under Whitehead v. Planters Bank & Trust Co., supra.

B.

It is patently obvious from the record that the misrepresentations in Green's pleadings and the fact that Foley received the December 14 letter the morning of the summary judgment hearing combined to prevent Foley from presenting the meritorious defense of

payment to the district court in a timely fashion. In his pleadings Green consistently and materially misrepresented his status as a holder of the notes, claiming that he was a "bona fide purchases or the notes for value." Green thus asserted that he had bought the notes from the banks, when in fact the money was supplied by Foley's partners via the partnership account. Until Foley got the December 14 letter he had no way of knowing that Green had obtained the notes in anything other than an ordinary arms-length transaction with the banks.

If Green had simply purchased the notes from the banks himself, the district court's conclusion that Foley was liable, as a guarantor, to Green as a holder in due course of the Sovran note would have been entirely correct once the district judge ruled that Foley

had waived his right to require Green to pursue the principals on the Sovran note. In fact, however, it is now clear that the notes were retired with partnership funds, or at a minimum, that Green was merely an agent for Zimpel and Silverstein, whose payments retired the notes.

Faced with the clear uncontroverted record, we are forced to conclude that the district court's finding that no fraud was present is clearly erroneous, and that the district court abused its discretion in denying Foley relief under Fed. R. Civ. P. 60(b)(3). Green's failure to disclose the true nature of the transaction between himself and Foley's partners and the banks holding the notes "struck at the very heart of the fact finding process" that is entrusted to the district court. Square Construction Co. v. Washington

Metropolitan Area Transit Auth., 657 F.2d 68, 72 (4th Cir. 1981). As we concluded in Square Construction, we conclude here that "the policy of deterring misconduct which threatens the fairness and integrity of the fact finding process must outweigh considerations of finality." Id. (citing Rozier v. Ford Motor Co., 573 F.2d 1332, 1346 (5th Cir. 1978)). Any other result would reward Green's wrongful acts by permitting him to retain the benefit of those acts, at Foley's expense and in derogation of the proper function of the federal courts.

III.

Foley also appeals the denial of relief under Fed. R. Civ. P. 59(e), complaining that he was unfairly prejudiced by Green's late filing of a response to Foley's motion for summary judgment. Because of our conclusion

that Foley is entitled to relief from judgment under Fed. R. Civ. P. 60(b)(3), we deem it unnecessary to reach the issue.

IV.

The question is not being before use, we are not required to investigate any claims that Zimpel and Silverstein may have against Foley for his share as a partner of the partnership indebtedness to Sovran Bank.

V.

The order of the district court denying Foley relief under Fed. R. Civ. P. 60(b)(3) is vacated. We remand the case to district court with instructions to enter summary judgment for Foley on the Sovran note claim, as there are no material facts in dispute and Foley is entitled to judgment as a matter of law.

VACATED AND REMANDED.

APPENDIX TO OPINION

TEXT OF LETTER REFERRED TO AT PAGE 5

December 14, 1984

Mr. Alan M. Silverstein
Mr. Stephen M. Zimpel
7297 Lee Highway
Falls Church, VA 22042

Re: Silverstein and Zimpel

Dear Alan and Stephen:

I represented the two of you in connection with your acquisition of an interest in DEG. When I met with you in April, we agreed that in addition to my hourly rate, which DEG was to pay, if the deal was consumated [sic], the two of you would pay me or my firm a fee of $10,000.00 for acting as a finder and for collateral services.

On November 28, 1984 I met with you again at your office. During our discussion I raised the question of the $10,000.00, which still had not been

paid. You both acknowledged the debt and offered me an alternative payment based on negotiable notes and guarantees signed by a general partner (Foley) in one of your real estate deals. You offered to buy the notes and guarantees from the banks in my name in order to free up your lines of credit on the one hand, and to pay your debt to me on the other. Subject to your completion of all of the conditions set forth below, I agree to accept the alternative payment.

The conditions are as follows:

1. You will purchase in or have assigned to my name (or the name of my law firm) notes and guarantees signed by Foley (and his wife) from certain banks, including Mount Vernon Savings and Loan as well as Sovran Bank.

2. The notes and guarantees will have a purchase price and a net

amount due in a sum in excess of $275,000.

3. The notes and guarantees will not be marked cancelled.

4. The costs of acquiring the notes and guarantees and of enforcing them (unless I elect to assume the costs of enforcement) will be paid by you.

5. Anything that is collected on the notes and guarantees will belong to me (or my firm if I so elect).

6. You have represented that the notes and guarantees are valid but that you believe Foley may not have sufficient assets to pay same; therefore, you do not guarantee collection, and that is a risk I will assume.

7. You also represented that Foley had breached his agreements with

you and that you have set offs and counterclaims against him. I advised you that you will not be given credit for the payments made to acquire the notes and guarantees because I will be the legal purchaser. You stated that you would assume the risk of any lawsuit by Foley for contribution and that whatever I recovered from Foley (and/or his wife) would not be subject to a reduction or payment by me to you for any sum Foley might be awarded from a cross claim, lawsuit or other actions against you. In other words, I will retain whatever I recover from Foley without regard to what occurs between you and Foley.

8. If you are unable to acquire the notes and guarantees mentioned above by April 1, 1985, or if you do not satisfy the conditions, I will have the option of terminating this

agreement, in which event, the said $10,000.00 fee will be paid by you.

If there is anything in this letter which does not accurately describe our agreement, please advise me promptly.

I am grateful for the opportunity you have offered in this innovative fee payment arrangement.

Sincerely,

/s/ Gary Green

GARY GREEN

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE
FOURTH CIRCUIT

October 12, 1988

FRANCIS D. MURNAGHAN, JR.
UNITED STATES CIRCUIT JUDGE
UNITED STATES COURTHOUSE
101 W. LOMBARD STREET
BALTIMORE, MARYLAND 21201

Office of Disciplinary Counsel
The Disciplinary Board of the
Supreme Court of Pennsylvania
3rd Floor, Commerce Building
300 North Second Street
Harrisburg, Pennsylvania 17101

Dear Sir/Madam:

It is with great regret that we bring to your attention the actions of a member of the Pennsylvania bar for investigation and possible disciplinary action. Because he is not a member of the bar of the United States Court of Appeals for the Fourth Circuit, and because he appeared before us as a party and not as counsel, we are unable to

initiate such action ourselves.

The attorney in question is Gary Green of the law firm Sidkoff, Pincus & Green, 530 Walnut Street, Twelfth Floor, Philadelphia, PA 19106. Mr. Green was the plaintiff-appellee in Green v. Foley, Nos. 87-2639, 87-2685 (4th Cir., Sept. 13, 1988). A copy of our opinion in the case is enclosed.

In Green v. Foley, we held that relief from judgment under Fed. R. Civ. P. 60(b)(3) was warranted and was improperly denied by the district court in view of the material misrepresentations made by Mr. Green in his pleadings in the district court We also call your attention to footnote 2 of the opinion, where we note that Mr. Green left his erstwhile clients exposed to double liability on the notes involved in the transaction giving rise to the litigation.

Mr. John M. Greacen, the Clerk of our Court, is prepared to provide any assistance you may require, including copies of briefs and other materials filed in this Court.

This letter is written with the concurrences of Chief Judge Winter and Judge Sprouse.

Sincerely,

/s/ Francis D. Murnaghan, Jr.

Francis D. Murnaghan, Jr.
Circuit Judge

FDMjr:mam
Enclosure

Office of Disciplinary Counsel
October 12, 1988
Page 2

cc: Circuit Judges

Chief Judge Bryan, E.D. Va. (w/encl)

Mr. John M. Greacen, Clerk

Mr. Gary Green (w/encl)

Mr. John Raymond Hartnett

Mr. Lawrence E. Freedman

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

GARY GREEN, Plaintiff,	:	CIVIL ACTION
-vs-	:	NO. 87-350-A
MAURICE P. FOLEY, Defendant.	:	

Friday, December 2, 1988

Alexandria, Virginia

Transcript of motion proceedings in the above-captioned matter.

BEFORE:

The Honorable ALBERT V. BRYAN, JR., Judge
United States District Court

APPEARANCES:

FOR THE PLAINTIFF:

JOHN TOOTHMAN, ESQUIRE
OF: JOHN D. GRAD & ASSOCIATES
112 N. Columbus Street
P.O. Box 1417-A44
Alexandria, Virginia 22313

FOR THE DEFENDANT:

JOHN HARTNETT, ESQUIRE
OF: BRINCEFIELD & ASSOCIATES
526 King Street, 423
Alexandria, Virginia 22314

* * *

DON McCOY, RPR
OFFICIAL COURT REPORTER
683-3688

APPEARANCES: (Continued)

ALSO PRESENT:

LAWRENCE FREEDMAN, ESQUIRE
OF: FREEDMAN & HOPKINS
10560 Main Street
Fairfax, Virginia 22030

P R O C E E D I N G S

THE CLERK: Civil Action No. 87-350-A, Gary Green versus Maurice P. Foley.

THE COURT: This comes on on the defendant's motion for Rule 11 sanctions, the plaintiff's motion for sanctions, an appeal of the Magistrate's order, and the plaintiff's motion for relief from judgment of he Court of Appeals, which frankly I am not going to entertain argument on. There isn't any way I can relieve you from the judgment of the Court of Appeals.

MR. HARTNETT: John Hartnett for Maurice Foley.

Good morning, Your Honor.

THE COURT: Good morning.

MR. FREEDMAN: Your Honor, I just mentioned to Mr. Hartnett -- Larry Freedman -- I am here at this point representing my own interests. I'm not

representing Mr. Green. He has separate counsel and has had for some time.

MR. TOOTHMAN: That's correct, Your Honor.

MR. FREEDMAN: I did file a written response, Your Honor.

THE COURT: Has any relief been sought against you personally?

MR. FREEDMAN: Yes. I believe in the Rule 11 they are requesting something from me. I have filed a written response in the form of an affidavit. I hope it has reached the Court. It went out early this week.

THE COURT: I am not sure.

MR. FREEDMAN: It's in the file, Your Honor. I have a copy if the Court doesn't have it.

THE COURT: I have it.

MR. FREEDMAN: What I said to Mr. Hartnett was I want to supplement that. I'll do so under oath if the Court

requests. One thing I forgot to put into that was at the time that I began to represent Mr. Green and was investigating the claim that he was giving me to represent him, I inquired of Mr. Green as to whether there were any possible defenses that Mr. Foley might have as to this claim.

Now, first, as the Court is aware, Mr. Green himself is an attorney in Philadelphia and has dealt extensively in commercial matters for many years. His response to me was that there was potentially a cross-claiming situation between Zimpel, Silverstein and Foley (phonetic) under a partnership agreement that had nothing to do with Green, but there were no defenses that he was aware of at all. He had purchased the note. That was that. The note hadn't been paid. There were no defenses he was aware of at all to the

claim.

I would just add that to what I put in my previous motion, because I had forgotten at the time I wrote that up of that inquiry that I did make of Mr. Green back at the beginning. Thank you.

THE COURT: Let me hear from the plaintiff. I frankly think that the Court of Appeals has left this case in a posture that I have very little choice but to impose sanctions. I am certainly not going to reexamine the facts underlying this case. The Court of Appeals has held that there are no material facts in issue. I don't known that I have the authority, and certainly I don't have the inclination to reexamine that. I will let you respond to that, sir.

MR. TOOTHMAN: John Toothman. I represent Mr. Green.

Your Honor, the problem is that this is a very serious situation. The facts, the Fourth Circuit believes it has found the facts that show fraud and referred the matter to a bar disciplinary proceeding. We are here now today on a Rule 11(a) motion for over $65,000. Mr. Green, because of the posture of the case, never got to tell his side of the story.

THE COURT: Well, but that's something that I assume was presented to the Court of Appeals.

MR. TOOTHMAN: But, Your Honor, we are saying that it was not, because we followed the procedures, and they were not presented to the Court of Appeals.

THE COURT: Why weren't they?

MR. TOOTHMAN: Because the record before Your Honor was that we decided the case as a matter of law on

the summary motion. There were then two subsequent attacks by Mr. Foley through reconsideration and a Rule 60(b) motion to try and shake Your Honor's decision, and Your Honor was not shaken.

THE COURT: Didn't you also make the same request for rehearing and so on before the Court of Appeals?

MR. TOOTHMAN: I didn't hear the first part of the question.

THE COURT: Didn't you also make requests for rehearing and further consideration before the Court of Appeals?

MR. TOOTHMAN: Yes, Your Honor. We also requested leave to supplement the appellate record, which was also denied.

I can answer the specific question or the premise of your question fairly quickly.

In our brief, in a footnote we

presented the basis upon which this Court could conclude that it is not bound by the findings of fact of the Fourth Circuit, if this Court concludes that it would not be just to do so.

I am trying to present a basis for this Court, not to second guess the Fourth Circuit but to see that justice is done.

Your Honor, it disturbs me that you feel that your hands are now bound when before you ruled in our favor. Before, you ruled that we had a meritorious claim, and certainly a meritorious claim--

THE COURT: The Court of Appeals said I was wrong, and we have to live with that. You might think that I was right and the Court of Appeals was wrong. We don't have that luxury.

MR. TOOTHMAN: Well, Your Honor, I am about to discuss why you do

have that luxury or that duty, but my initial premise is that it is not just a matter of some people win and some people lose. There are very devastating consequences flowing from the fact the who story was never told and only half of the story has been told through irregularities in the proceeding.

At page 10 of our brief in footnote 11, there is a discussion of the exception to the law-of-the-case doctrine. This Court does not necessarily have to follow bindly the mandate of the Fourth Circuit. Your Honor has a separate duty to do what is just, and then the Fourth Circuit can correct Your Honor if it feels that you have made a mistake. It disturbs me that the process is now running so fast and running without any consideration of the merits anymore that Mr. Green is being deemed to have done something that

he has never been heard on and which isn't the fact. It isn't the fact that he did anything fraudulent. It isn't the fact that he structured this transaction. It isn't the fact that this note was paid off.

But because of the presumptions of the judicial process, which are designed in the overwhelming majority of the cases to insure one full fair hearing but only one and not belabor the point and have them dragging on through repeated hearings, that at least you will be heard one.

Mr. Green hasn't gotten that hearing. Your Honor, I believe if you reviewed his affidavit and the excerpts of the depositions that we have called the Court's attention to in he brief, this shows what a travesty of justice has been wrought here.

THE COURT: But the Court of

Appeals didn't remand it to me with a direction to entertain a hearing on the merits. They remanded it to me with a direction to grant summary judgment to the defendant.

MR. TOOTHMAN: I am concerned, Your Honor, we are going to take our licking here. We are not asking to overturn this whole situation. We just want to avoid through the 60(b) motion and through our opposition to sanctions, all these presumptions that are now flowing from facts found by the Appellate Court on half a record. Your Honor is a trial level Court. You are accustomed to finding facts. In this case, we never got to tell our side of the story. And because we followed the appellate rules we didn't throw in these depositions--in the appellate record without first seeking leave. That's the problem. The other side did. And so

their facts were found and were said to be contested. Or were uncontestable.

But they are not uncontested, Your Honor. We just followed the rules. The facts that the Appellate Court found were just not the facts, Your Honor. Mr. Green is being made--he is a partner in a Philadelphia firm. He is now in great jeopardy of losing not just his livelihood but his entire professional reputation because he came into this Court to enforce a note that he took for some client of his as a favor. He did them a favor to take that note in $10,000 in hard fees that he could have insisted on payment of and now the man is being told to committed a fraud in Court. He is a very honest, reputable attorney, Your Honor. To say that the wheels of justice are now so greased that we can't possibly slow down to find out what really happened here and to

cause all these things to flow from one decision of the Fourth Circuit, all I am saying is that Your Honor really does have discretion to examine the justice of the situation.

THE COURT: I am sure I do but I am not willing to reexamine the total merits of this lawsuit

MR. TOOTHMAN: I am not asking for that specifically, Your Honor. Our 60(b) motion, Your Honor, is designed to say that because of all the facts that are flowing from this decision, of the Fourth Circuit, that we believe we should be entitled to put this information into the record and that if this Court were to determine that thee is a real factual dispute, I believe that it would be within the Court's power under Rule 60(b) to order the trial take place. We are not saying you should reverse the Fourth Circuit but

just allow the facts to be heard.

Your Honor, it is a very grave situation. It's a scary situation in many respects because it's the kind of situation that if you read particular Mr. Green's affidavit, you can see how at every step of the way, he was doing the logical thing, the rational thing, the legal thing, the thing that an attorney ought to be encouraged to do and yet now all of a sudden the mousetrap has struck and he is a gentlemen who is coming ut of a Kafka novel now.

He doesn't know whether he is every going to be able to convince the Court to pay attention to his plea that he didn't o anything wrong. He is being told in the Pennsylvania Bar proceeding, we are not going to make a de novo review either. They are going to take all those facts. The Fourth

Circuit did the same thing, and the Supreme Court undoubtedly, in considering, which we are planning to file--

THE COURT: I don't know about that body but I think do have to take the facts that the Court of Appeals found as true. I don't think that applies the sanction which I have in my discretion but I don't think I have the luxury of reexaming facts the Court of Appeals has found.

MR. TOOTHMAN: I believe you do, Your Honor, if justice requires it. What I am saying is because there is only half a record here and if you would look at the factual submissions we have made to examine them, you might be convinced that the factual determinations by the Fourth Circuit could have been in error because of the procedural irregularities and on that

determination, I am not suggesting that you are supposed to reverse the Fourth Circuit. But if you find that there has been injustice, it is incumbent upon you to at least allow us to make that record and to suggest perhaps that from your perspective looking at the facts that you have looked at you have some question. If you can do that, then it may be possible to shake some of these otherwise intransigent alternatives that are now befalling Mr. Green and jeopardizing him when as I said the man never took the stand. He never was deposed. He never had his day or couldn't explain what happened and now everybody is presuming he is a fraud.

THE COURT: The Court of Appeals said it. They said he was clearly guilty of fraudulent -- I forget what the language is -- but you will recall it, I'm sure.

MR. TOOTHMAN: Yes, sir.

What it is, Your Honor,was it applied the Rule 60 standard for reconsideration or relief from the judgment, and used the prong of a fraud on the Court is the way I would quickly describe it. A necessary finding in the course of that was that they found misrepresentations to Your Honor specifically. Now, if Your Honor will recall and certainly our pleadings have made it clear at the time that Your Honor was considering this question not once but three times before it went to the Court of Appeals, you have in front of you all the documentation that the Court of Appeals then found showed fraud, on this Court.

Now, the interesting irony is how could it have been a fraud on this Court if this Court had in front of it all the information? Fraud on the Court

requires hiding or misrepresenting to the Court but the documents used by the Fourth Circuit were also before this Court.

Another concern of ours, Your Honor, is that Mr. Green is basically being hoisted upon his own statement. He is being accused of committing a fraud on this Court. Your Honor might say he has been found to have committed a fraud upon this Court by the Fourth Circuit. Yet he is being hung by his own statement. If the man were a fraud on the Court, he would have hidden it. He would have destroyed something. But what did he do? He provided in discovery the very things that are now being used against him. He produced them not only in a timely fashion. He didn't have to be compelled to answer these questions. He willingly produced this information before it was due. He

had at least three or four more days before the discovery was due to be filed but he filed it early. How is that evidence that the man committed a fraud on the Court? It's a very scary situation, Your Honor, because all he did was follow the rules and now he is being told that because they delayed taking their discovery, because they did not make the argument sooner, he committed a fraud on the Court, and made misrepresentations to them but he never did that. He never made any misrepresentation to them.

He wasn't even deposed. His pleadings although they use some phraseology which doesn't really apply to the situation, referring to the phrase "bonafide purchaser," there is no such thing as a bonafide purchaser of a note. There is a holder or holder in due course. Bonafide purchaser is an

Article 2 concept. Holder and holder in due course are analog in Article 3. But for some reason he is being told because he claimed to be a bonafide purchaser, he somehow defrauded the Court and defrauded the defendant.

But that's not the case. He gave $10,000 in value for that note. Your Honor, for those reasons, not only do we believe that this Court's had are not tied on he subject of sanctions, particularly in terms of the finding of facts, but also that this Court could grant the 60(b) motion.

Your Honor, are are also aware that we have requested an evidenciary hearing on this matter, because we believe that before $65,000 more in sanction can be awarded --

THE COURT: Well, I haven't arrived at any figure.

MR. TOOTHMAN: I understand.

THE COURT: I understand that's what is being requested. All right.

MR. TOOTHMAN: Let me -- I would like to go through the Rule 11 and list from another thing. Your Honor is aware I contend there is no basis for Rule 11 sanctions on the question of whether Mr. Green misled the Court about the facts, because I believe that he didn't. If he were allowed to tell his side of the facts in fact --

THE COURT: I am not going to let you reexamine the facts that I find the Court of Appeals has already decided. One of those is that in his pleadings, Green consistently and materially misrepresented his status as a holder of the note, claiming that he was a quote "bonafide purchaser of the note for value."

Now, that is a fact that I

don't think I can reexamine to determine whether it's true or not. It's a finding that I don't think I can reach.

MR. TOOTHMAN: Your Honor, would you consider in the alternative though issuing some sort of finding that if you were allowed to consider the fact --

THE COURT: No.

MR. TOOTHMAN: I didn't think so, Your Honor.

There is another aspect of the Rule 11 sanction question, not only can one be sanctioned for misstating the facts, and I contend we did not although there is some dispute about that and perhaps none, the other argument is also whether we wee making allegations that were clearly frivolous under the law at the time. The Fourth Circuit again makes it sound as though the law was very clear, but yet they only cite one

Virginia Supreme Court case that is factually distinguishable form the 1940's before the Uniform Commercial code was even in effect.

Yet in our reconsideration motion to the Fourth Circuit, we pointed out a 1981 case from the Supreme Court--

THE COURT: Why go through this exercise? I haven't the authority to reexamine whether the Court of Appeals was right.

MR. TOOTHMAN: But, Your Honor, in a sense having to examine that question from another perspective in deciding the separate question which again was not decided by the Fourth Circuit yet, that whether these things were os bad that sanctions have to be entered. You have an independent duty at this juncture to decide the question of whether sanctions need to be entered.

THE COURT: I agree with that.

MR. TOOTHMAN: In considering that, we are not supposed to be bound any way in a determination of our bonafides in making the arguments. Just because we lost, not every litigant who loses on an appeal, particularly a litigant who won who are going to be sanctioned under Rule 11. That may be even true for all 60(b) motions that are granted on appeal based on fraud.

Just because the Court determines that there may have been some misrepresentation to the Court, it isn't a fortiori that that is a ground for Rule 11 sanctions.

Once again, Your Honor, I am going back to the fundamental concept of due process. This Court may feel bound by the Fourth Circuit's decision. I have cited cases that suggest that it is not, if it's necessary to avoid an injustice. Mr. Green should be heard,

not just because for an institutional reason this court should follow a superior Court. That is an important reason but the due process clause and the concept of giving a person a day in Court before serious sanctions are entered against him ~~is~~ an even more fundamental concept. I believe the orderly institution of -- or orderly relationship between this court and the superior Court must spend some time to the dictates of due process.

That's why we feel this Court should make its own independent determination taking into account the Fourth Circuit facts and so forth, its own determination of the bonafides of Mr. Green before it enters the sanctions which can be devastating to the career of any attorney, particularly a person who has no other -- no opportunity to be heard, no blemish on his record. It's

very scary situation, Your Honor.

Your Honor, may I review my notes to see if there were any other points I wanted to make?

THE COURT: Yes.

MR. TOOTHMAN: Your Honor, there were several statements in the brief of Mr. Foley that I would like to call to the Court's attention to show that there are over, far favor overstatements of even what the Fourth Circuit which made a very wrong finding against Mr. Green said.

Particularly I believe the best example is at page 17 of their brief in which they say quote, "Plaintiff and his counsel actively prohibited defendant from discovery said defendant meaning the payments of defendant -- "Are fraudulently pleading the claim and intentionally failing to disclose the rue nature thereof."

There is a situation in there that says intentionally failing to disclose the true nature of the claim. Your Honor, we gave the discovery. It was then used to hang us. Mr. Green did not --

THE COURT: You have already pointed that out.

MR. TOOTHMAN: I'm sorry, Your Honor.

Your Honor, I also wanted emphasize it is in our brief, at pages, in a couple of places though, that Mr. Foley in arguments that he had made previous to the relation of a letter which the Fourth Circuit found to be so compelling, has even in his answer for instance pled payment and satisfaction and discharge of the note, so therefore once again, the suggestion that we made misrepresentations upon which he relied to his detriment cannot possibly be

correct because the gentlemen pled the very defenses that the claims we denied him the ability to plead.

Your Honor, unless you have further questions, I have no further argument although I am again, I am not waiving my contention that I should have been allowed to present evidence.

MR. FREEDMAN: Did Your Honor want to hear from me next or from Mr. Hartnett? We are sort of out of sequence here.

THE COURT: I asked counsel for the plaintiff to be heard first. I will hear from counsel for the defendant.

MR. HARTNETT: May it please the Court, there are I think five motions that have been noticed today. I think the Court as already indicated it feelings as to most of those.

THE COURT: Well, they all

resolve around the same issues.

MR. HARTNETT: Yes. We had filed preliminary objections to several of the motions filed by Mr. Green just due to the timing of them since we received those motions on Wednesday and they were noticed today. I am prepared to withdraw those objections and we can argue them because I think they do all address the same issue which is an attempt to reopen a record which I don't think that anybody here has the power to do. I think we have got a conclusive record.

One objection we would not withdraw, however, Your Honor, and I think it's one that yo do need to rule on today, is this submission of some four deposition transcripts by Mr. Green. They are approximately two inches thick, and it is an attempt to again reopen the record and belabor

that. These depositions were not part of the case that was sent to the Fourth Circuit by an agreed designation of the record, not just a unilateral one. There was an agreed designation of the record. These depositions wee available to Mr. Green, some of them as much as nine months before the hearing and the earlier of then at least 30 days before the hearing.

I would point out as to the attempt generally to reopen the record, and I understand Your Honor's point of view on that, and I think it's the correct one, that throughout all of these proceedings in the Fourth Circuit, there was a designation of the record which we have attached as supplement to our pleadings that object to the use of these four deposition transcripts, an agreed designation of the record.

That agreed designation was

pending for perhaps seven months. There was never any effort to dispute anything on the record and in fact the case that was submitted to the fourth Circuit was submitted on an agreed set of facts and it was merely the interpretation of those facts that was in dispute.

I think the Fourth Circuit has ruled on that. Subsequently there is an adverse ruling to Mr. Green and suddenly he says that there are facts that weren't brought before the Court.

It's not so. But separately, Your Honor, I think you are bound by the mandate, as are the parties here. So we would ask that you deny the 60(b) motion, Your Honor.

I would also point out that Mr. Green has filed a motion for sanctions of his own against Mr. Foley.

THE COURT: That's just the best defense is an offense.

MR. HARTNETT: That's my opinion, too, Your Honor, and I think it's blocking for a 60(b) motion. I think that's exactly what it's for.

I think for the same reasons that inform a denial of a 60(b) motion, the motion for sanction also must be denied simply because it attempts to reopen a record that is contrary to the mandate and it's contrary to the agreed designation of the record that was submitted to the Fourth Circuit by myself and Mr. Freedman as Mr. Green's counsel. Mr. Green had his opportunity to be heard. He has been caught.

I would continue, Your Honor, that as to the other matter which I think requires a denial is this appeal of Magistrate Brinkema's ruling which again turns on the same set of argument which is an attempt to depose me, as Mr. Foley's counsel and to depose Mr. Foley,

not for purposes of addressing a sanctions motion but rather to reopen a record and to protract and to prolong this litigation, which has already cost Mr. Foley a remendous amount of money in Fairfax, here and in the Fourth Circuit, all attributable to Mr. Green.

Your Honor, if I might, I would just now ask that every one of the motions filed by Mr. Green be denied as part of the Court's ruling today; and if I might, I would just now like to move on to the issue of the appropriateness of sanctions and the quantum of sanctions that should be imposed.

THE COURT: Briefly, because this --

MR. HARTNETT: Briefly, Your Honor. I think virtually all of the arguments that I would make here are contained in the brief, but I would remind the Court about one in particular

that is contained in our supplemental memorandum in support of the motion for sanctions.

That is if I might just quote to the Court very briefly that when the Federal Courts are used for a manner inimical to their purpose, Rule 11 has been violated.

That is a quote from the Easy Way Construction Case (phonetic) that we quoted in our supplemental memorandum in support of the motion for sanctions.

I would also point out to the Court that where, as he, the initial pleading, he complaint, is itself fraudulent, and I think that the facts are conclusive that they are fraudulent, that every other pleading, and there have been many, numerous,not just in the Court of Appeals, but over in he Fairfax Court in a matter that is directly related to a defense raised by Foley in

this Court, and in fact Mr. Green's affidavit bears that out, that where that occurs there is a violation not only of that original complaint, but of every other signed pleading and the proceedings stemming therefrom. That is why we have claimed all of Foley's fees in this multilevel litigation as appropriately recoverable pursuant to Rule 11.

THE COURT: Is it appropriate to grant all those fees? That is a fairly substantial sanction. A sanction is a deterrent type of thing.

MR. HARTNETT: Your Honor, I agree with you that a sanction is a deterrent, however the cases that we cite to you also cite in addition to the purpose of deterrence, the purpose of compensation of the injured party here, foley, to the tune as I say of some $78,000, and also he purpose of

punishment; and I think all three of those purposes have to be examined within the context of Mr. Green's conduct and perhaps Mr. Freedman's. I accept Mr. Freedman's representation that he spoke, and this is the first that I heard of that, but that he spoke with Mr. Green, and Mr. Green assured him that there were no defenses and that Mr. Green had paid the banks. In fact we know that that was not the case. I think the Court can make a distinction perhaps as to whether Mr. Freedman was taken in in the same way that Mr. Foley was taken in.

But that's not within our purview here. We have asked for joint and several sanctions. I think that what's appropriate here is the examination of the conduct that brought about this large number of legal fees. I think that we should keep in mind that

the Fairfax forum who chosen by Mr. Green when there was a case already pending in this forum, and he simply could have filed he and had the cases tired together. But he did not do that. He chose the Fairfax forum, and he said so in his affidavit, in order to hide the fact from Foley that he was worried about Foley's defense of he Virginia notice statute.

Mr. Green in his affidavit also states that the instructed his lawyer Mr. Freedman, not to let Foley know about that other file. But there is a direct link between the action over in Fairfax, and that matter is still pending, Your Honor. That matter,and the case in this Court, and I think the Rule 11 sanction reach all of those, because we have a three-fold purpose of number one, I believe to be a deterrent for the offending party; number two, I

believe the cases show that there should be compensation to the offended party, here Foley; and number three, I think that there is purpose and we have been told that Mr. Green is a partner in a prestigious Philadelphia law firm. We are told that he has grave consequences at stake. We think that they ought to be grave, because we think that the conduct here is egregious.

If you want to deter Mr. Green and if you want to punish Mr. Green and most importantly if you want to compensate Mr. Foley for this bad case, you should give him all of his fees and we would ask that that order not just include all of the fees in this Court, in the Court of Appeals, and the Fairfax case, but that that be until this matter is concluded, because as you can see from the record in front of you, just of the past week, Mr. Green has continued

to paper this court and to paper Mr. Foley with numerous motions. He is not going to stop. I think this matter needs to be concluded but I think it's pretty easy to see when they are talking about a petition for a writ of certiori and we are talking about a ruling in this Court today, that they are planning on taking this thing as far as it can go to protract it as far as it can go for purposes of delay.

I think that Mr. Toothman knows, he doesn't have any chance of getting any other ruling than the one he has got but that's not stopping them. And that is the way these people do business, Your Honor. You have got to teach them a lesson. That's all I have.

THE COURT: Mr. Freedman?

MR. FREEDMAN: May it please the Court, my position in this matter of course is a little bit differently

structured than the other litigant to it. Mr. Green came to me asking me to represent him to pursue some notes that he had purchased and had not been paid. As my memorandum in affidavit set out he provided me information that verified in fact he had a claim, verified that he had no statement endorsed over to him. He verified that he had paid consideration for them, and in fact when I inquired of him as to whether Mr. Foley had any potential or his wife also was included in that conversation, that is whether Mr. or Mrs. Foley had any potential defenses to the claim made, to be made by Mr. Breen, I was informed no, that there weren't any, that the only litigant possibility would be a series of cross claims between the partners to the partnership, that is Zimdel, Silverstein and so forth.

Your Honor made your ruling in

this Court when we requested summary judgment based upon the guarantee of the note. that was Your Honor's ruling, based upon the guarantee of the note.

That Friday morning that we came in to argue both the motion for summary judgment filed by Mr. Hartnett and the motion that I had filed as well, we came forward. He had filed some requests for discovery prior to time. The discovery wasn't due until the middle of the following week, but because I knew I would be seeing him here and because the responses and the documents and other information is voluminous, I handed it to him here in Court in this courtroom prior to our argument on motion for summary judgments.

Contained in that package of materials that I gave to him was he letter that the Court of Appeals has

made such movement of and is he foundation of Mr. Hartnett's claims. When I handed it to him or just prior to handing it to him, it was the first time I had seen it. I didn't known of its existence prior to that time.

Subsequent to that time, Mr. Hartnett on behalf of Mr.Foley raised a series of defenses in Fairfax to whit alleging the payment of the note by virtue of the financial transactions that developed we found out later on whether moneys were deposited and taken out and so forth by Silverstein and Zimdel.

Mr. Zimdel's deposition was taken and Mr. Foley's counsel brought this to the attention of the Court of Appeals. I didn't feel it was appropriate to bring in extraneous information not a part of this record to the Court of Appeals, and for that

reason, never raised the depositions of either Silverstein or Mr. Dunn (phonetic), who was the officer at the bank who handled these transactions, which substantially explained and contradicted what Mr. Zimdel thought were the circumstances.

That set of factual documentation has never hit the light of day. Now, that set of factual documentation would give credence to my statement to this Court that in fact, there was justification for the response by Mr. Green to me that he didn't feel there were any defenses to this action. However, because that information has never been presented to this Court, although I believe Mr. Green's counsel now attempted to do so in presenting transcripts to the Court, part of my justification for accepting his word that there were no defenses is not

before the Court nor can it be presented to the Court unless the Court revises those transcripts. It was not part of the Court of Appeals record because it was in the Fairfax Circuit Court that those depositions were taken. They were not part of the record of this Court and cannot be presented according to my understanding of the rules to the Fourth Circuit Court of Appeals, so I didn't.

Now, I don't believe, Your Honor, that as counsel for Mr. Green through the process of this Court, that I have done anything improper that would require sanctions. I made a rational investigation of the claim. I received exhibits documenting the claim made by the client. I made inquiry as to what else there might be. And knew of nothing that the Court of Appeals relies upon until I presented it here to Mr. Hartnett or shortly before that, that

day when Your Honor was ruling on the motions for summary judgment.

Subsequent to that time he reviewed those documents and before the matter went up on the appeal filed subsequent motions before you saying that wait a minute, we have just found this out, and this could affect it.

Your Honor did deny his motions accordingly. I don't know what more I could have done nor what this Court would ask me to do than what I did do. I ask that any request for sanctions be dismissed.

THE COURT: Anything further/

MR. TOOTHMAN: Briefly in reply: Mr. Freedman has just addressed one of the primary points I was going to make, which is that its reason -- much was made of the fact that there was an agreed designation for the purpose of the appeal of the record. Well, thee is

always an agreed designation, but what has to go into the record is what was before this Court. They are the ones who submitted deposition transcripts by letter to the Fourth Circuit.

The irony here is that the facts, the depositions and so forth that they submitted a great deal of them were submitted through a rule 60(b) motion to this Court and then that record went up with the appeal of the summary judgment decision and denial of the reconsideration. So that's how they got their information into the record unopposed by us.

But now we are attempting to tell this Court the full story, and we are being told that that is an impropriety. That is the route they took before, Your Honor. This case has been, he trial of this case began with entry of summary judgment by the Court.

That's when the facts started coming out. That's when the argument about the facts began and a lot of legal theories developed because it used to be a simple case on a note. They had notice of the relationship between Green and the other two people. They knew that if they took discovery they would find out more. They just waited.

THE COURT: Yes, but it was your motion for summary judgment that short circuited the ordinary trial process.

MR. TOOTHMAN: There were cross motions, I believe, Your Honor. Also, Your Honor, we answered all their discovery early so it's not as though that by filing summary judgment motion in compliance with this Court's rulings that require filing of such motions before the cutoff of discovery we were somehow taking an underhanded attempt--

THE COURT: I don't suggest that.

MR. TOOTHMAN: I'm sorry, Your Honor.

Your Honor, if I may I would like to analyze certain parts of their request for sanctions because I believe they are particularly in appropriate: the suggestion that this Court could enter sanctions for proceedings or expenses of proceedings in the Fairfax case, another Circuit Court, a separate Court with its own sanction authority, is incorrect. This Court has no ability to sanction conduct before another Court. The question of their appropriateness or not is best left to the Court.

Similarly, the Court should not enter sanctions regarding behavior of the Court of Appeals. The Court of Appeals has the authority to do that, I

believe. It's not the place of this Court through its Rule 11 to decide whether thee should be sanctions entered for conduct or for time spent on an appeal. That's a matter that should have been addressed to the Fourth Circuit.

As to why the case was filed in the State Court, it's my understanding, Your Honor, that that was because Foley sent the letter to Green demanding that the should have been sued in the State Court and thee was some suggestion that he was the one who raised, and intended to rely upon the State statute of Virginia, which requires that should be brought against the partnership nd other procedural matters relating to suits against partnerships. And that was an issue that I believe was precipitated by Mr. Foley's insistence upon that, insistence

that they had not waived that right. so if there was a suit brought in State Court it wasn't necessarily because Mr. Green wanted to.

I am sure he would have preferred to have one action resolving all these disputes with Mr. Foley rather than two or three or four as I believe there now are.

Your Honor, in analyzing the factors addressed by Mr. Hartnett,he suggested that thee were three factors to be considered in entering Rule 11 sanctions. Two of them are really I believe the same. One is deterrence and one is punishment.

Mr. Green is a respected attorney. He has already been damned, punished, deterred by this conduct. He has been found by the Fourth Circuit in a published opinion to have been engaged in fraud. That's fairly significant

sanction for a man of his standing in the community. It's already ruined his career, Your Honor, especially if he never gets an opportunity to tell his side of the story. He will never be vindicated. And that is a very significant sanction in and of itself, apart from Rule 11, the money.

Money is a small matter here. This isn't a question of a case being driven by desire to avoid $20,000 or $30,000 here or $60,000 there. This man's career is worth a lot more than that to him. His good name is worth a lot more than that to him and to the firm that bears his name. It's not a case driven by desire to avoid a few pennies here and there. It's a case driven by the fat that already he has been given one of the most severe sanctions that any attorney could ever be given, not be put in jail.

Many attorneys would be pleased to serve time in jail if they were fighting for a cause. For instance, if they felt they were right and they were held in contempt they might be pleased to serve time in jail because they felt they were doing a professional duty but a jail term or a sanction or a monetary penalty is not something an attorney really fears.

It's the sullying of his good name and that's already occurred here and occurred in a manner that is particularly nightmarish for an attorney because it occurred without any due process of law. It's the one thing that an attorney such as Mr. Green stand for, it's an attorney who fights for civil rights and constitutional rights everyday. He believes in the Constitution and his right to tell his side of the story. He believes also in

the following of the rules of the Courts so he said I will bide my time. I will follow the rules. I will not throw deposition transcripts from the State Court proceeding in an appellate Court record by letter. I won'd do that. I will follow the rules.

And for his trouble, what he got was his reputation already ruined and now having added insult to injury, the suggesting that he should pay for somebody else's attorney's fees.

All we have to justify these fees is a conclusory affidavit absolutely no -- it's the sort of documentation of fees that is given with tongue in cheek because it dosen't allow analysis. It is just simply pages and pages of conclusory statement but no analysis. We are supposed to be paying for word processing time, for endless conferences.

Your Honor, just looking at the total amount of fees that are being requested here, it's an awful lot of money to be spent on a case resolved on a cross motion and a case on a note. $60,000 in fees is an awful lot of money.

There was some suggestion that we are going to continue to take appeals and that we are somehow being obstreperous and undermining the functions of the Court. We are following all the rules, Your Honor. Everyone who takes a certiori petition knows they have a very slim chance of having it granted no matter how wrong their case may have been. But in this situation, Mr. Green is simply trying to still in the end believe that the system is going to right its wrong and to find the true facts or at least not continue to punish him without his ever having

had his day in Court to explain himself.

Your Honor, unless you have further questions, I have no further statement.

THE COURT: Very briefly.

MR. HARTNETT: Your Honor, the Rule 11 just asks that Foley be reimbursed for his legal fees which were all totally unnecessary here. You have just heard from counsel for Mr. Green that this thing has no prospects of ending. And that is why we would ask that we be permitted to supplement those fees up through whatever point in time Mr. Green sees fit to give up the ghost and take his medicine. I think that we can pretty much at this point project that there may be appeals of your ruling here today that go up to the Fourth Circuit and this thing might not be over for another year. I think that therefore, not only should Foley's

motion for sanctions be granted, as to everything that he has asked for and those damages go through the end of October only, October of '88; we have got all of November and there was a lot that Mr. Green forced us to do in November.

I think we are going to see some more. We would ask that until such time as Mr. Green ceases this charade, that Foley be awarded his legal fees pursuant to the Rule 11 motion. Thank you, Your Honor.

THE COURT: The purpose of a Rule 11 sanction is primarily punitive to defer future conduct such as the Court of Appeals has found occurred in this case. While it is to benefit the wronged party, to some extent, I don't view that as the primary role of a Rule 11 sanction. I think rule 11 sanctions are in order, and I think the Court of

Appeals' finding that the plaintiff consistently and materially misrepresented his status as a holder of the notes claimed that he was a bonafide purchaser of notes of volume is a fact that I cannot reexamine. I don't think it's binding on the Court as far as whether to impose Rule 11 sanctions, but in the face of it, it seems to me that absent some extraordinary circumstances that even accepting the proffers of the plaintiff's attorneys, I do not find to be present.

Certainly sanctions are in order. I will award sanctions, but I do not intend by them to fully compensate the defendant for his attorney's fees, because I think that to do so unduly punish the plaintiff, who will already be and has already been punished.

So the figure I am going to award does not attempt to fully

compensate the defendant for its attorney's fees, and therefore, I don't get into the question of whether those attorney's fees are reasonable. I don't suggest they are unreasonable. I don't mean that, but I don't make any determination, because the figure I am going to award is not going to fully compensate the defendant for his attorney's fees.

But it seems to me, given the punishment that the plaintiff a already undergone, that an award of $20,000, while admittedly not all of attorney's fees, that the defendant has incurred in this Court -- I wold agree that the attorney's fees in the other Court are not an appropriate measure -- is in ny view a sufficient sanction, to vindicate the objective sought to be vindicated by Rule 11.

More would unduly punish the

plaintiff when considered in the context of what he has already undergone. Less would in my view minimize the seriousness of the conduct that the Court of Appeals has found and which I don't think I am able to reexamine. I see no need for any further evidentiary hearing. I am unwilling to grant any 60(b) motion for relief of the judgment of the Court of Appeals. I think that further discovery in the case is unwarranted and therefore the Magistrate's order granting a protective order is appropriate, and obviously the plaintiff's motion himself for Rule 11 sanctions will be denied.

The request for fees, an award of fees as against both counsel and the plaintiff, I am unpersuaded that counsel for the plaintiff's conduct was sufficiently reprehensible or did not objectively show a reasonable

investigation into the validity of the plaintiff's claim. So the imposition of the sanction will be against the plaintiff himself and not against counsel.

I will prepare the order.

MR. TOOTHMAN: Your Honor, may I move now at this time to stay executive of that sanction until we have had an opportunity to bring an appeal to the Fourth Circuit?

THE COURT: Well, upon the posting of a supersedeas bond, I don't think I have any choice in that matter. I would think a $25,000 supersedeas bond would be sufficient, provided it is -- how long do you want to post that bond?

MR. TOOTHMAN: I would have to check with my client, Your Honor. It's my understanding of these processes that they sometimes take -- may take several weeks.

THE COURT: I am not willing to wait several weeks. I will direct that it's to be posted if there is to be any delay of execution on it by midweek. And that's Wednesday.

MR. TOOTHMAN: All right.

MR. FREEDMAN: Your Honor, I understand that the sanctions are against Mr. Green individually but not against counsel?

THE COURT: Yes, sir.

MR. FREEDMAN: Thank you, Your Honor.

THE COURT: Court will stand adjourned.

(Whereupon, at 12:20 p.m., Court was adjourned.)

APPENDIX G

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA

ALEXANDRIA DIVISION

GARY GREEN,	)	
	)	
Plaintiff,	)	
	)	CIVIL ACTION
	)	NO. 87-350-A
v.	)	
	)	
MAURICE P. FOLEY,	)	
	)	
Defendant.	)	

O R D E R

For the reasons stated from the bench, it is hereby ORDERED that:

1. The motion of the plaintiff for sanctions pursuant to F.R.Civ.P. 11 is denied.

2. The motion of the plaintiff for reconsideration of the magistrate's order of November 18, 1988 is denied.

3. The motion of the plaintiff for relief from judgment is

denied.

4. The motion of the plaintiff for an evidentiary hearing is denied.

5. The motion of the defendant for sanctions pursuant to F.R.Civ.P. 11 is granted, and there is imposed against the plaintiff, Gary Green, but not his counsel, a sanction in the amount of $20,000.00. Execution on this sanction is stayed on condition that the plaintiff on or before December 7, 1988, post a supersedeas bond in the amount of $25,000, conditioned according to law and secured by either cash or surety approved by the clerk.

/s/ Albert V. Bryan, Jr.
United States District Judge

Alexandria, Virginia
December 2nd, 1988

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

GARY GREEN, Plaintiff,	)	
v.	)	CIVIL ACTION NO. 87-350-A
MAURICE P. FOLEY, Defendant.	)	

PLAINTIFF'S MOTION FOR RELIEF FROM JUDGMENT

Pursuant to Rule 60(b) of the Federal Rules of Civil Procedure, plaintiff, Gary Green, does herewith move and petition the Court for an order granting relief from judgment on the grounds as more particularly appear in Plaintiff's Memorandum of Points And Authorities In Support of Plaintiff's Answer In Opposition To Defendant's Motion To Impose Sanctions, that the judgment of this Court, and the decision of the court of appeals, above, were

based upon a mistake of fact and error of law, and that the judgment, as entered, is clearly erroneous and works a substantial injustice.

In the interest of economy, the court's attention is respectfully invited to:

(1) Plaintiff's Memorandum Of Points And Authorities In Support of Plaintiff's Answer In Opposition To Defendant's Motion To Impose Sanctions,

(2) Exhibits In Support Of Plaintiff's Answer In Opposition To Defendant's Motion For Sanctions, Plaintiff's Motion For Sanctions, And Plaintiff's Motion for Relief From Judgment,

(3) Deposition Transcripts In Support Of Plaintiff's Answer In Opposition To Defendant's Motion For Sanctions, Plaintiff's Motion For Sanctions, And Plaintiff's Motion For Relief From Judgment, and,

(4) Affidavits In Support Of Plaintiff's Answer In Opposition To Defendant's Motion For Sanctions

filed with this Court on November 28, 1988 and incorporated in support of this motion by reference.

Respectfully submitted,

/s/ Philip L. Chabot, Jr.
JOHN W. TOOTHMAN
PHILIP L. CHABOT, JR.
SUSAN B. SMITH
GRAD, TOOTHMAN, LOGAN
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Attorneys For Plaintiff

November 29, 1988

APPENDIX I

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

GARY GREEN,	:
Plaintiff	:
v.	:
MAURICE P. FOLEY,	:
Defendant	:

AFFIDAVIT OF GARY GREEN

Gary Green, being duly sworn, deposes and says:

1. I am the Plaintiff in the above captioned action.

2. I am an attorney licensed to practice in the Commonwealth of Pennsylvania since September of 1972. My practice has consisted primarily of trial law, with a heavy emphasis on civil rights, and other complex litigation in Federal Courts. In

addition to litigation, I have on occasion performed services for corporate clients and individuals in the form of helping them to devise business strategies and drafting contracts.

3. I have never represented any banks, and do not hold myself out as, nor regard myself to be an expert in banking matters or commercial paper; when such issues have been raised in client matters, they have been handled generally by other attorneys in my firm. I believe I am qualified to handle cases and issues involving the law of Pennsylvania and most Federal litigation, but I recognize that I lack the qualifications to handle for clients matters involving Virginia law, and except where Virginia law is the same as Pennsylvania law, I am unfamiliar with it.

4. I met Alan Silverstein in approximately 1977 when he was a staff attorney for the Equal Employment Opportunity Commission, assigned to the Philadelphia Regional Office of that agency. At the time, I was representing a class of women who were suing Sun Oil Company for violations of Title VII, and Mr. Silverstein was counsel for the EEOC in a companion suit against the same employer. Our cases were consolidated, and Mr. Silverstein and I collaborated in presenting a joint case against the employer which achieved a very successful result. Mr. Silverstein and I became friends as a result of that case.

5. When Mr. Silverstein left the EEOC in October of 1981, he joined up with Stephen Zimpel and went into the building development business in the northern Virginia area. I had contact with Mr. Silverstein on a friendly

basis, but as I had no expertise in the law of building development or real estate, and was not familiar with the local law where his business was being conducted, I performed no legal services for Mr. Silverstein or Mr. Zimpel on those matters, but rather, they employed attorneys in Virginia and Washington D.C.

6. The attorneys from Virginia and Washington, D.C. that Messrs. Zimpel and Silverstein used and relied on from 1981 through about 1987 included:

(a) William Hanes, Esquire (Washington, D.C.)

(b) Pohoryles and Greenstein, P.C. (Washington, D.C.)

(c) Robert Staton, Esquire (Washington, D.C.)

(d) Metzger. Shadiac and Schwartz (Annandale, Va.)

(e) Russel Sherman, Esquire (Annandale, Va.)

(f) Madigan and Scott, Inc. (Springfield, Va.)

(g) Robert Madigan, Esquire (Springfield, Va.)

(h) Szabo, McCarthy, Quinto, Webb and Zelnick, P.C. (Woodbridge, Va.)

(i) Thomas J. Colucci, Esquire (Arlington, Va.)

7. Although my lawfirm and I had been requested on occasion to perform legal services involving Virginia law for Messrs. Zimpel and Silverstein, and entities they owned, it was necessary for me and my firm to decline the assignments. I made it emphatically clear that my lawfirm's expertise with Virginia law was too deficient and we were too ignorant of the unique provisions of Virginia law to perform professional services for them where Virginia law would be involved. In short, I have not advised these or other clients about Virginia law.

8. In approximately 1982, Messrs. Silverstein and Zimpel became interested

in several business ventures which were based in and around Philadelphia, and they asked me to represent them in some of those matters; these business ventures were not in any way related to their building development business or what they were doing in their home state, but rather were in the nature of loans to and investments in small commercial companies that Mr. Silverstein and his usual business partner, Stephen Zimpel, were making. My role was generally to form Pennsylvania corporations for them and/or to prepare agreements which would protect their investments or loans in Pennsylvania, and sometimes, to help negotiate the deals. This resulted in only infrequent involvement with Messrs. Zimpel and Silverstein in professional matters although I still maintained a

social relationship with Mr. Silverstein.

9. In 1983, Mr. Silverstein advised me that he and Mr. Zimpel wanted to increase the diversification of their investments as a hedge against the risks of a down-turn in their local real estate/building development business. I mentioned that I knew of a situation involving the principal shareholders of a former corporate client ("DEG") that Mr. Silverstein might wish to explore. DEG was in the business of asbestos removal, and the principal shareholders were not getting along with Wallach Gear Co., a venture capital shareholder which had guaranteed DEG's debt. It was my view that if Messrs. Zimpel and Silverstein were willing to invest or loan cash to replace Wallach Gear Co., and to assume its guaranty on the loans made by DEG's banks, they probably could

obtain a meaningful ownership position in DEG. I told Mr. Silverstein that while I did not represent DEG, I was willing to talk to the principal shareholders, and to act as an intermediary. Mr. Silverstein told me to proceed, and stated that he would reward my efforts with a bonus fee if the transaction succeeded. Ultimately, Mr. Silverstein promised to pay me a bonus fee of $10,000.00 for acting as intermediary and for bringing him the opportunity.

10. In the period March - April of 1984, Messrs. Zimpel and Silverstein did in fact make loans to DEG, and did replace Wallach Gear Co. as a 40% shareholder in DEG. After the initial agreement between the DEG shareholders and Messrs. Zimpel and Silverstein had been reached, my firm was retained by DEG as its attorney, and it was paid on

an hourly rate basis for the services lawyers in my firm rendered.

11. During 1984, as a result of the participation by Messrs. Zimpel and Silverstein in the affairs of DEG (which was based in Malvern, Pennsylvania, a suburb of Philadelphia), and due to their interests in other Pennsylvania based businesses, I had much more contact with them. I still did not have any knowledge of, nor involvement in any of the Virginia based real estate/building development activities engaged in by Messrs. Zimpel and Silverstein and/or their various business entities.

12. Throughout most of 1984, discussion of my $10,000 bonus fee with Messrs. Silverstein and Zimpel was deferred due to the press of other matters.

13. In November of 1984, I met with Messrs. Zimpel and Silverstein at their office in Virginia to review some of the issues I was handling for them, including DEG. During the meeting Messrs. Zimpel and Silverstein were distracted from the matters I had come to discuss and were quite distressed by a business transaction involving the defendant Maurice Foley and two banks that Messrs. Zimpel and Silverstein used regularly for their building development business.

14. Prior to my November meeting with Messrs. Zimpel and Silverstein, I had never heard of Mr. Foley, nor did I know anything about any business transaction involving him. I also knew nothing of Messrs. Zimpel and Silverstein's relationship with Mr. Foley. As part of the conversation, both Messrs. Zimpel and Silverstein told

me that several years prior, they had entered into a partnership with Mr. Foley in connection with the conversion of apartments to condominium units. They stated that they had paid Mr. Foley $20,000 and had given him 40% of the partnership (Fairfax Associates) to act as a guarantor on notes of Fairfax Associates held by two banks; Mr. Zimpel, his wife and Mr. Silverstein were also guarantors on the Fairfax Associates notes which, evidenced money loaned to it.

The project was originally to be 100% financed by the bank loans, and they related to me that at first, none of the partners paid any money except for the $20,000 Messrs. Zimpel and Silverstein paid to Mr. Foley. The condominiums were to be converted by Fairfax Associates, a partnership consisting of Zimpel and Foley as equal

general partners, and Silverstein as 20% a limited partner. They stated further that in its first year of operations, all of the partners had taken from Fairfax Associates substantial sums of money as anticipated profits, but that they had miscalculated and were told by the banks that they had taken out too much money, thus requiring immediate repayment of substantial portions of the bank loans by the individual guarantors. In the end, Fairfax Associates showed a big loss and had no assets.

15. The reason why Messrs. Zimpel and Silverstein were upset at that November 1984 meeting is that there was approximately $275,000 still due to the banks, Fairfax Associates had no assets, and their request to Mr. Foley that he contribute to paying off this final debt had been rejected flatly.

16. Messrs. Zimpel and Silverstein explained further that they had each made repayments to the bank out of their personal funds in the preceding years, but Mr. Foley, who had received more than $200,000 in "anticipated profits", had refused to make any repayment contributions to the bank loans himself, and in fact, had paid nothing. They stated further that when Fairfax Associates ran out of money but still had not completed the conversion of the condominiums, the two of them had used still <u>additional</u> personal funds to pay contractors, but had received no reimbursement or contributions from Mr. Foley. Their present dilemma was that they needed to maintain good relationships with the two banks because of their other building projects which were financed by these two banks, but the banks were demanding that they, as

guarantors of the partnership's loans, take care of the outstanding debt.

17. Out of curiosity, I asked why the banks or they did not consider instituting suit to collect the balance from Mr. Foley. They replied that Mr. Foley had refused to make any contribution, and in fact had told them that he was "broke", judgment proof, and not concerned about any action the banks might take against him to enforce the notes and his guarantees. At that point, I commiserated with them, and the discussion moved on to other topics.

18. Later in the day, during the course of the meeting, the question of my $10,000 bonus fee was raised. At that point, the Foley problem was mentioned again as Messrs. Zimpel and Silverstein explained to me that while they had plenty of cash in the bank, they anticipated that as part of their

year-end business strategy they might need their cash, and if they paid off their guarantees on the $275,000 debt, they would be reluctant to commit to payment of further cash to me at that time. Nonetheless, they emphasized that beyond the payment that they would be making to the two banks, both were upset more because Foley would be totally let off the hook, and would have been the only partner who would have received "profits" from the transaction, but who made no cash contribution whatsoever.

19. During the conversation, Messrs. Zimpel and Silverstein repeatedly asked for my advice, and I repeatedly stated that I was not sufficiently familiar with Virginia law or the particular conversationally transaction to give a legal opinion. I did tell them however, that I had heard of transactions in Pennsylvania where

obligations were not extinguished because they had been assigned to a third party by a bank rather than paid off. I explained that I had not personally handled such a transaction, but that in the cases that I knew of, the third party essentially received a "gift from the debtor" and used that gift to buy the debt, thus avoiding the extinguishment of the debt. I told them that these transactions were discussed openly as a legitimate debtor/creditor strategy, and I was not aware of any reason under Pennsylvania law to invalidate such a transaction although I again reminded them I was neither an expert on commercial paper law or what would be the result under Virginia law.

20. Messrs. Zimpel and Silverstein both informed me emphatically that the Fairfax Associates partnership was defunct, insolvent, and had no funds of

its own to pay off the notes. They stated also that under the Fairfax Associates partnership agreement, none of the partners was required to invest additional capital. Furthermore, Mr. Silverstein was only a limited partner. I did not ask to see that partnership agreement and they didn't offer to show it to me because it was clear to all that I was not conversing with them about Foley in my capacity as their attorney, but rather, I was merely acting as their friend while they vented their anger and frustration.

21. Toward the end of that November 1984 meeting, Messrs. Zimpel and Silverstein suggested to me that perhaps I would be interested in trading the $10,000 bonus fee that they owed me in exchange for becoming a "third party" who would obtain the notes from the banks. Their reasoning was that if they

could buy my "goodwill" and at the same time pay off their debt to me, they would feel better about paying the banks. When I asked them jokingly why they thought they would be buying my "goodwill", they said that Foley might "get back on his feet" sometime in the future, and then I could recover much more an my $10,000 bonus. I let them know that I did not consider their proposition to be a good investment for me or my lawfirm.

22. Nevertheless, recognizing the difficulty I would have in getting them to pay promptly the $10,000 bonus fee in cash due to the other plans they said they had for their cash, but more, to help my friends and clients overcome their distress of having to make substantial payments to the banks while Mr. Foley paid nothing, I agreed reluctantly and tentatively, (subject to

my having discussions with the partners in my law firm) to trade my fee for the bank notes. I asked Mr. Silverstein to check with his local attorneys and the banks to determine if and how such a deal could be structured, and I then left the meeting and returned to Philadelphia.

23. During the next few days, I did not give any thought to the matter. However, on December 14, 1984, Mr. Silverstein contacted me by phone and raised the subject of transferring the notes and guarantees to me or my firm. He stated that he had promised Sovran Bank (one of the banks to which the notes were owed) the debt would be off its books by year end. I asked Mr. Silverstein if he had obtained an opinion about structuring the transaction, and he said he was working on it. After I hung up from my

conversation with Mr. Silverstein, I canvassed the views of the partners in my law firm. The general consensus was that the real "goodwill" was not what we would feel towards Messrs. Zimpel and Silverstein, but rather their good feelings about our firm if we helped them. The consensus was that we were skeptical of ever obtaining a recovery, but even if we didn't, we would be helping our good friends, and would, in a quixotic way, serving justice by making Mr. Foley accountable for a valid debt.

24. Mr. Silverstein called me later on December 14th, and I related the views of my law partners. I told him also we did not want to spend a "fortune" on legal fees. He responded that he and Mr. Zimpel would advance the legal costs if my firm could not find an attorney to take the case on a

contingency fee basis. I told Mr. Silverstein that I would send him a letter describing my understanding of the transaction, and asked him to show my letter to one of his local attorneys and the banks. If they all approved, he could count me in; otherwise, I would be perfectly happy to forget the deal and wait for him to pay my $10,000 bonus fee. I told Mr. Silverstein I would call him back and read him the letter after it was composed.

25. I conferred with several lawyers in my firm and we drafted the December 14, 1984 letter which became an exhibit in this case. I then called Mr. Silverstein, and in a conference call with him and Mr. Zimpel, read the letter. During that call I also emphasized certain points. According to my best recollection, I highlighted the

following issues in describing the letter:

(A) I reiterated that I was willing to forego the entire transaction and to simply wait for my bonus fee. When they responded that they preferred to go through with it, I read them the sarcastic last paragraph of the letter, which stated,

> "I am grateful for the opportunity you have offered in this innovative fee payment arrangement".

(B) This language was sarcastic because I had communicated my view repeatedly that I thought I was doing Messrs. Zimpel and Silverstein a favor and that I would

much prefer payment of my $10,000 bonus fee. The know I was not "grateful" at all because I never expected to collect from Mr. Foley. Moreover, the word "payment" was used sarcastically because, for the sake of good client relations, I was, in my mind, agreeing to an arrangement which was tantamount to forgiving payment of the bonus fee.

(C) I told them that I was relying on them to find out from their local attorneys and the banks how the matter was to be structured. Therefore, in the first numbered paragraph of the letter I

was purposefully vague about the mechanics of how the notes would be obtained because I didn't know the appropriate way.

(D) To further indicate my lack of enthusiasm for this deal, in the fourth numbered paragraph I reiterated that they would be responsible for obtaining the notes and if my firm could not find a Virginia lawyer to enforce the notes pursuant to a contingent fee agreement and, if we therefore asked, Messrs. Zimpel and Silverstein to help, they agreed they would be responsible for the costs of enforcement.

My point was that while I was willing to take a business risk for my firm's $10,000, I was not willing to spend much additional money. I said my fear was that if my firm determined that it was not a good business decision at any point to continue to pursue collection, I did not want Messrs. Zimpel and Silverstein to be urging us on (at the risk of losing their goodwill) without having any cost or risk of their own. In my opinion, if they were forced to contribute to the cost of collection, there would be less of a

likelihood that they would press us to "beat a dead horse" just to spite Foley or get revenge.

(E) In connection with numbered paragraph 5, I emphasized that whatever I got from Foley would be mine (or my firm's) despite what they may have spent to obtain the notes and guarantees in my name. I told them that they should look at this as a real business transaction with my firm and that if they thought Mr. Foley would recover soon, or would pay the notes, they should reconsider the deal. I urged them to discuss

this point with their local attorney.

(F) We discussed numbered paragraph 5 and they reiterated that the notes were not subject to any defense. I said that I would rely on what they said to me, but that if their local attorney suggested defenses, they should tell me.

(F) In discussing numbered paragraph 7, I told Messrs. Zimpel and Silverstein that I was in no position to offer them legal advice about their rights vis-a-vis Mr. Foley because I had never seen any of the written documentation, had

examined no records, knew nothing of Virginia's commercial loan laws, and mainly, was specifically acting as a "businessman" in this transaction with the intention of being at arm's length with them. I stated it would not be ethical for me to attempt to be both their lawyer and the person with whom they were entering into a business deal. At this point, I reiterated that they should consult with their own local attorneys because I was assuming that Messrs. Zimpel and Silverstein knew what they were talking about when they said they had

defenses and set-offs they could assert to defeat any claim against them Mr. Foley might assert. Since Mr. Silverstein is himself an attorney, I was sure he understood what I was saying.

(H) I emphasized also in discussing numbered paragraph 7 that it was possible Mr. Foley might sue them if I obtained a judgment and that if Mr. Foley got an award of damages against them, they could not look to me for help. In making this point clear, I stated that it was possible they might end up spending

more than the $275,000 needed to acquire the notes because they might end up having to pay something to Mr. Foley, and I urged them to explore this point with their local attorneys. They assured me that they were aware of the risks and would explore the issue. Again, because Mr. Silverstein is an attorney, I did not doubt their assurances.

(I) In discussing numbered paragraph 8, I stated that I was not asking them to sign this letter because it would only become an agreement if they acted on it and

fulfilled the conditions. We all recognized that it was merely an offer. I stated that if their local attorney or the bank balked about anything in the letter, or if they decided not to go through with the transaction, they could back out at any time with no hard feelings or penalty. I stated also that if they couldn't do the transaction by April 1, 1985 we should forget about it and they should simply pay my bonus fee. They agreed.

26. I ended the conversation by saying that I would wait to hear from them. At that point, I knew nothing

about any requirement in Virginia or any other law that I would be obliged to sue the partnership or Mr. Zimpel in his capacity as general partner before obtaining a judgment against Mr. Foley on his guaranty, and therefore, the issue was not discussed.

27. It was my view that this was a perfectly legitimate business transaction. Messrs. Zimpel and Silverstein spent hundreds of thousands of dollars and Mr. Foley had taken out hundreds of thousands of dollars. There was a valid debt that Mr. Foley had guaranteed. He clearly had a valid obligation to the banks. I was paying $10,000 for a highly speculative claim against him. The banks would be getting real dollars for the assignment of the notes to me.

Between me and Messrs. Zimpel and Silverstein, I was giving value and

they were getting: (a) payment of what they owed me; (b) good relations with banks they dealt with regularly; and (c) the satisfaction of knowing Mr. Foley was not getting a free ride. Thus, the transaction seemed a fair and beneficial business deal. Moreover, because the Fairfax Associates had no funds, and no partner had an obligation to put in more capital, it was clear that no partnership money would be or could be claimed to have been used or that the partnership was satisfying its debt. As a result, Mr. Foley's obligation would be the same to me as it was to the banks; it would not be increased. Finally, I could see no legal, ethical or moral reason why Mr. Foley should enjoy a benefit from additional personal funds spent by Messrs. Zimpel and Silverstein when they did not wish to confer any benefit to him. The

transaction was to be open and above board, and full disclosure was to be made to the banks; the transaction was also documented openly in my letter of December 14, 1988. When I considered whether there was anything improper or unethical in the arrangement, I concluded there could be no claim of fraud or "sharp" practices because the equities seemed to be all on our side.

28. I did not think about this transaction any further until sometime near Christmas of 1984. Mr. Silverstein had attended a DEG Christmas party in Malvern, Pennsylvania and either I attended as well and we spoke there, or he called me about it. During that conversation, Mr. Silverstein advised me that he had made arrangements to purchase a cashier's bank check in my name from Sovran Bank and that this bank check would be used to buy the note

guarantees for me. (Sovran was one of the banks to which the money was owed.) The discussion about this subject was quite brief, but I recall that he said that Sovran Bank thought this was the best way to do the transaction and that it wanted the loan off of its books before the New Year. I replied that I would await further developments and that if Messrs. Zimpel and Silverstein were satisfied with the arrangement, I was willing to proceed.

29. On December 31, 1984, Mr. Zimpel called to wish me a happy New Year, and in passing mentioned that he had deposited his and Mr. Silverstein's checks in the Fairfax Associates' account. I asked him why he did that and he said that he thought it was as good a way to buy the note for me as any other. I asked if he had conferred with Mr. Silverstein and he replied that Mr.

Silverstein was "running around" and that he had left a list of things for Mr. Zimpel to do, including "buy notes for Gary". I advised him to check with Mr. Silverstein because he had advised me of a different arrangement he had made with Sovran Bank. I speculated that if a Fairfax Associates' check was used, the intended benefit of the transaction (keeping the debt alive so it could be transferred to me) might be frustrated; I specifically did not tell or advise Mr. Zimpel to withdraw funds from the Fairfax Associates' account but rather, merely suggested he confer with Mr. Silverstein.

30. I did not have any discussions about the notes nor did I think about them again until sometime in 1985 when the original Sovran note and guaranty was received by mail or Federal Express delivery in my office from Sovran Bank.

I assumed that Sovran Bank would not have issued the note and guarantees to me if they were invalid and I had no suspicion that a claim would be made that the Fairfax Associates' debt had been extinguished. If there was a cover letter that came with the note and guarantees, I did not retain it and, therefore, do not now know the exact date. I put the Sovran note and guarantee in my firm's safe. (I do not recall any of the circumstances involving the Crossland Savings note and guaranty.)

31. In the Spring of 1985, one of my law partners came across the notes and guarantees in our safe and asked me what I intended to do with them. I responded that since Mr. Foley appeared to be insolvent, I intended to just hold the notes and guarantees. He then convinced me that it was important to at

least have a judgment entered on the guarantees since if Mr. Foley filed under the bankruptcy laws we would then be listed as a creditor, or if he became solvent we would not have to wait to collect. I agreed to proceed.

32. I contacted Lawrence E. Freedman, Esquire because in the mid-1970's he had represented a group of Virginia based defendants in a lawsuit I had filed in the United States District Court for the Eastern District of Pennsylvania on behalf of the plaintiffs. Mr. Freedman impressed me as a worthy opponent in that case, and he was the only lawyer I knew personally in Virginia. I offered Mr. Freedman the case and he accepted, albeit not on a contingent fee basis.

33. On August 19, 1985, I forwarded Mr. Freedman the guarantees and notes.

34. On April 7, 1986, Mr. Freedman sent to me by mail a copy of a complaint he had drafted against both Mr. Foley and his wife (who had signed a guaranty). I had no hand in drafting this document. I glanced through it upon my receipt, and then handed it to an associate in the office for the purpose of determining whether it was appropriate. I had determined in my own mind that this was a low priority matter due to my belief (later confirmed by Mr. Foley's deposition) that he had no attachable assets and even obtaining a judgment could be a futile gesture.

35. In his cover letter forwarding the complaint to me, Mr. Freedman had asked for my comments. I do not recall making any, nor giving any further thought to the complaint, other than perhaps to learn from the associate that the complaint seemed adequate, although

some of the terminology seemed old. [In retrospect, on reading the complaint now I see that it differs markedly from the style I and my firm uses. For example, we do not use the word "count" until after we have described the facts central to all counts; we have a set formula for pleading jurisdiction and venue in a diversity case which does not look at all like Mr. Freedman's; I would not have readily used the words "bona fide purchaser of the notes" because that term does not seem appropriate in the context of a commercial paper case under law I am familiar with; and I would have referred to the parties as "citizens" of their states rather than refer to their "residence". (See, Complaint at Paragraph 1)]

36. I expected Mr. Freedman to be conversant with the law of Virginia and thus, for example, when I saw ~bona fide

purchaser" used in the complaint he drafted, I assumed it was a term used in his jurisdiction that could be equated with a "holder", which I thought I was. Similarly, the first notice that I had there was a law in Virginia (Section 49-26 of the Code of Virginia) that required that upon demand I could be made to sue the Fairfax Associates partnership and Mr. Zimpel as the managing general partner, occurred on October 24, 1986 when Mr. Freedman forwarded to me a copy of a letter dated October 23, 1986 from a John R. Hartnet, Esquire, counsel for Mr. Foley.

37. I had no knowledge of the Virginia Code and that is why I retained Mr. Freedman. However, because he had never raised Section 49-26 of the Virginia Code in our discussions, I had one of the associates in my firm research the issue. I received back a

research memo which indicated that Virginia was among a small group of jurisdictions that had such a law. However, it appeared that a good case could be made that Mr. Foley waived the protection of the law by the language in the guarantees. Also, other reasons for the non-application of the law were more than arguable.

38. Nonetheless, I immediately contacted Mr. Zimpel and advised him that I might be obliged to sue him. I stated that if he objected, I would accept my $10,000 bonus fee and drop my action against Mr. Foley, or if he didn't object I would proceed as required. I told Mr. Zimpel I would try to avoid suing him, but could not assure him that a suit could be avoided. Mr. Zimpel, after conferring with Mr. Silverstein, said that in any suit, he was convinced he would be able to shift

full liability to Mr. Foley and he said he would assume the risk of my suit.

39. I contacted Mr. Freedman and told him to start suit against Mr. Zimpel and Fairfax Associates in state court as a protection, but to press the waiver argument in the Federal Court suit. I instructed him further to not notify Mr. Foley until necessary because it might be possible to drop the suit if the waiver argument prevailed. Mr. Freedman and I agreed that Mr. Foley was not a necessary party in the state court suit because he had already been sued on the note and guaranty in Federal Court, and another suit against him for the same paper would be redundant and could be deemed harassing. Furthermore, I did not want to be viewed as conceding that such a suit was necessary absent a ruling from this court.

40. Mr. Freedman suggested that since my firm had researched the issue, we might write the first draft of any reply to a Motion to Dismiss that Mr. Foley might file relating to Section 49-26, and I agreed.

41. I assigned an associate in my firm the task of monitoring this aspect of the case and later, when the issue was raised by Mr. Foley, my firm did write the first draft of the reply brief. We also drafted my summary judgment motion.

42. On or about June 7, 1987, I received copies of Mr. Foley's first written discovery requests. An associate in my office working on this case was assigned the task of assembling and preparing answers. It was my intention to provide all of the information requested and to do so as soon as possible since I had nothing to hide.

43. With a cover letter dated June 19, 1987, we sent Mr. Freedman complete answers, responses and documents, including a copy of the letter dated December 14, 1984, which letter became part of the record which satisfied all of Mr. Foley's written discovery requests. While these responses were not due until July 7, 1987, it was my goal to have them produced before the deadline. In fact, Mr. Freedman delivered them on July 2, 1987.

44. The Fourth Circuit's harsh descriptions of this transaction shocked me. I know now and believed in 1984 that no Fairfax Associates' money or assets were ever used to buy the cashier's check which was then used to obtain the notes and guarantees. Moreover, at no time did I have any reason to believe that any Fairfax Associates' partnership funds or assets were ever used to buy

the notes and guarantees or that such a defense would be raised, let alone adopted by the Fourth Circuit because Fairfax Associates was totally insolvent and Messrs. Zimpel and Silverstein had assured me that they were using their personal money to buy the cashier's check for me. They were not quite wealthy in 1984 and even if they had given me the cashier's check it would not have been a fraud on any of the creditors. The deposit of funds by Zimpel into the Fairfax Associates account was to me an obvious mistake; he would obtain not one benefit by intentionally depositing money into the Fairfax Associates' account and he could have suffered the detriment of losing the pay-off of my $10,000 bonus fee. [I have since learned from reading David Gunn's deposition that he, as the party representing Sovran Bank, had no

knowledge of Zimpel's mistaken deposit of funds into the Fairfax Associates' account nor did he ever believe that Fairfax Associates' funds were used to buy the cashier's check. Mr. Gunn always thought that the personal funds of Messrs. Zimpel and Silverstein were being used to buy the cashier's check in my name. More importantly, the Gunn deposition shows that the deposit into the Fairfax Associates' account was totally irrelevant because Mr. Gunn debited the personal accounts of Messrs. Zimpel and Silverstein to purchase the cashier's check in my name which was used to buy the notes and guarantees.]

45. There was no attempt to hide any part of the transaction nor to "launder" money or perpetrate a fraud. The same is true in the conduct of the litigation. This entire transaction was open and fully documented. My December

14th letter set out the plan and we produced that letter, willingly, in discovery before it was even due. [I do not know what Mr. Freedman had in mind when he stated that my December 14th letter was produced by mistake. This comment appears in the transcript of the Zimpel deposition taken in the state court proceeding. I was not present. However, the hard evidence shows that no mistake was made; as my written answers to the request for documents show, I fully intended to produce the letter, willingly.]

46. The cashier's check was purchased openly, with full disclosure to Sovran Bank of its intended use and the purpose of the transaction. The use of the cashier's check which was purchased with funds debited directly from the personal accounts of Messrs. Zimpel and Silverstein merely documented

that these funds were specifically not intended to be viewed as Fairfax Associates' assets or a payment by the guarantors of their debt. Moreover, Mr. Silverstein was not a general partner in Fairfax Associates yet more than $93,000 was taken from his personal account to purchase the cashier's check.

47. Nothing in the transaction defrauded Mr. Foley; his defenses and cross-claims, if any, against Messrs. Zimpel and Silverstein were unaffected. He had no right to defend on the ground that the debt was extinguished because it was not. I paid the bank with a cashier's check bought for me, in my name. That check cost me $10,000. Mr. Foley did not contribute any of the funds used to buy that check.

48. Nothing in the litigation was fraudulent or unethical. We provided our responses and answers to discovery when

asked, and before they were due. Under Rule 8 of the Federal Rules, we pleaded a short, plain, truthful statement of our contentions; we were not obliged or even allowed to anticipate defenses. In my view, I was in direct privity with the banks. Since Messrs. Zimpel and Silverstein did not use partnership funds, and intended to not get any benefit by having the notes and guarantees assigned to me (other than the payment of the bonus fee), I saw the mechanics of the note, at the complaint stage, as irrelevant.

/s/ Gary Green
GARY GREEN

SWORN TO AND SUBSCRIBED
BEFORE ME THIS DAY
OF , 1988.

NOTARY PUBLIC

APPENDIX J

Federal Rule of Civil Procedure 11 provides:

"Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the party's pleading, motion, or other paper and state the party's address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney or party constitutes a certificate by the signer

that the signer had read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or

both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee."

APPENDIX K

Federal Rule of Civil Procedure 60(b) provides:

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is

based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C. § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and

bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief form a judgment shall be by motion as prescribed in these rules or by an independent action.